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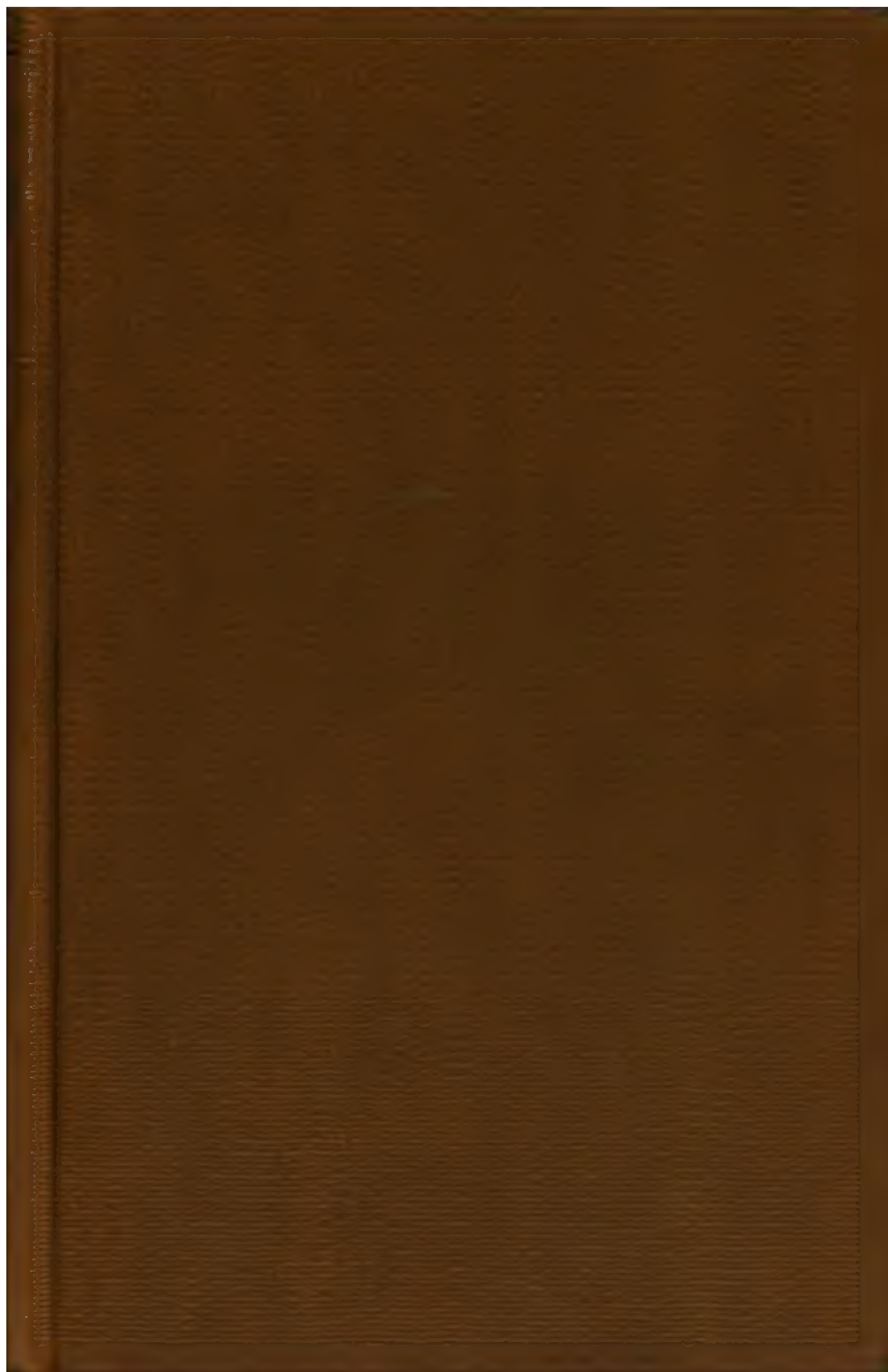
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J.M

COMBINATION, CONSOLIDATION  
AND  
SUCCESSION  
OF  
CORPORATIONS.

PRINCIPLES, RULES AND LEADING CASES COLLATED,  
CLASSIFIED, ABRIDGED AND  
ANNOTATED

BY  
ANDREW J. HIRSCHL,  
OF THE CHICAGO BAR.

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TO THE

HON. JOHN F. DILLON,

WHOSE CAREER, AT THE BAR, ON THE BENCH AND IN  
THE LECTURE ROOM, HAS BEEN THE INSPIRATION AND  
EDUCATION OF MANY THOUSANDS, THE FOLLOWING PAGES  
ARE GRATEFULLY DEDICATED BY HIS PUPIL AND ADMIRER.





## PREFACE.

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It is with great diffidence that the following pages are offered to the profession; and ere doing so at all this apology is made both for the author and the subject; for the author, that he has undertaken, perhaps too rashly, a task which it might well have been hoped and expected would have been allotted to some one more able and experienced; for the subject, that a full and exhaustive treatment, commensurate with its importance, should have been so long delayed.

Scope of the effort herewith presented is not readily designated, just as many legal principles are more easily illustrated than defined.

Without attempting to state precisely what is and what is not included, and omitting most likely in the book itself many things which should not have been omitted, but on the other hand, by way of equitable compensation, including many things which should have been omitted, suffice it to say that the underlying plan of the endeavor, at least so far as betrayed by any overt act, is to consider those cases which affect a corporation in its own existence—deal, as it were, with its own entity, with the modification and possible destruction which may befall the same in the various vicissitudes to which it may from time to time be subjected.

This much can, however, be safely asserted: the work is not put forth as a competitor with the great texts on corporation law; it aims only to take a small portion of this great topic, and, by reason of its importance, magnify it for the closer inspection of the reader; or, if the analogy be pardoned, the author would wish that somewhat as Doctor Rogers presents Expert Testimony in comparison with Greenleaf's comprehensive work, or as Judge Dillon wrote on Municipal Bonds, segregated from the general texts upon negotiable paper, so the following pages may be found with reference to such great works as "Cook on Stock and Stockholders and Corporation Law," to be but sup-



## INTRODUCTORY.

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THE nature of the subject does not well admit of reduction to a series of principles; nearly every case will be found to be *sui generis*, the decision arrived at being based, perhaps, upon a greatly involved and complicated state of facts, or upon some particular statutory phraseology, or, again, upon terms and conditions of contracts; hence, the only attempt made is to group or classify the cases in accordance with the particular phase of the topic to which they relate; cases involving merely the application of local statutes are not given.

For the convenience of the reader each chapter is made to represent a general division of the main topic; the several cases in each chapter stand as the subdivisions; so much of the facts, nature of the litigation and reasoning of the court is given, as is deemed essential to show precisely what was considered and what was decided.

The foot notes contain in the main the authorities cited in the opinions, respectively.

At times one case presents two or more topics, and should be repeated in another chapter; but it is given only once, as it is deemed best in one analysis to present all its features.

The topical index at the end of the book will, it is thought, be found serviceable and sufficient for the purpose of readily ascertaining the various pages on which the respective subjects are presented.





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# CORPORATE COMBINATION, CONSOLIDATION AND SUCCESSION.

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## CHAPTER I.

### COMBINATIONS, MADE BY RAILWAY CORPORATIONS WITH RAIL- WAY OR OTHER CORPORATIONS, UPHELD.

The cases in this chapter present instances in which contracts, pooling arrangements, or courses of dealing, of railway with railway or other corporations, involving leases, or other uses of property, traffic arrangements and guarantees were sustained, and such defenses as that the contract was void because *ultra vires*, or against public policy, on account of being in illegal restraint of trade, or tending to create a monopoly, were not sustained; or instances where, although the contract itself between the parties was void, one party had derived such a benefit from the other party as to be under obligation to make compensation as upon an implied contract; or, although the contract was contrary to public policy, one party had derived a benefit and their relations were such that the maxim, *in pari delicto potior est conditio defendentis*, did not apply.

At the basis of these questions are the principle that a corporation has only such powers as are granted to it by its charter, and an attempt to exercise any power not so granted is *ultra vires*, irrespective of any question of immorality or public policy (although circumstances may arise whereby a corporation is estopped from asserting such a want of power), and the maxim which pervades all departments of law, and which affects individual contracts equally with and to the same extent that it does contracts with corporations, *salus populi suprema lex*.

The grounds upon which a contract will be held to violate

this maxim will be found to arrange themselves under two heads—contracts which are immoral, and consequently bad in themselves, are necessarily contrary to public policy, or, secondly, the contract, while presenting no element of immorality, has such a tendency as, if executed, would be against the general welfare.

The decision of the last question necessarily involves the exercise of a sound judicial discretion in determining at what point, or under what circumstances, a contract improperly restrains trade or smothers competition, as by raising the price of any commodity or of transportation, or creates a monopoly so as to be contrary to public policy.

A consideration of this principle will explain and harmonize many differences of opinion between the judicial tribunals of different jurisdictions, which would otherwise amount apparently to a conflict of authority, and will also mark the reasons for the decisions given in the next chapter.

The nature of the business contemplated by a contract or arrangement, and the tendency of the contract as affecting the public, rather than whether the parties to the contract are corporations or individuals, are to be considered in determining whether it violates public policy.

A private individual may conduct a railway or steamboat line, an inn or a warehouse, or any such quasi-public business, and a contract would not be held valid or invalid in such a case any more readily, or upon any different grounds, than if the parties to the contract were corporations.

The law in relation to the doctrine *ultra vires*, and that the contract violates public policy, is almost entirely evidenced by our judicial precedents, excepting that the powers of corporations, being the creatures of legislation, are limited, controlled and, at times, arbitrarily restricted thereby, in manner, perhaps, that individual power could not be.

From our decisions the following rules may be gathered :

A contract in restraint of trade is not necessarily void.

A contract having for its object the prevention of competition is not necessarily void.

A contract obviating ruinous competition, and, though raising prices yet not raising them unreasonably, nor tending to create a monopoly, may be valid.

And again:

The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers.

Corporations are presumed to contract within their powers.

Contracts, not on their face necessarily beyond the scope of the corporation power, will, in the absence of proof to the contrary, be presumed to be valid.

Acts within the general power, but done in disregard of some formal prerequisite, may nevertheless be upheld when not promptly objected to by those in position so to do, and, when rights of innocent parties have become involved, with reliance thereon.

There is a difference between attempted contracts which are immoral, bad *per se*, and those which fail simply because of lack of power to enter into them.

Though both parties be *in delicto*, yet if they be not in *pari delicto*; that is, if the guilt of one be great and be that which is aimed at by the statute, or principles involved; but the guilt of the other be less, and be not that which is contemplated; and, if there be nothing immoral in itself in the transaction, equity, even if not the law, may still grant relief to the latter.

Neither the doctrine *ultra vires*, nor illegality can be invoked to defeat a recovery (at least to the extent to which the contract has been performed) upon a *quantum meruit* for benefits received by a transaction not bad *per se*.

Or a recovery to the extent to which the other party still retains the fruits of the transaction.

Or a recovery enforcing the implied promise to return property received under unauthorized acts.

Or a recovery ordering compensation to be made therefor.

To give such a remedy is not to affirm the contract, but to give a remedy appropriate upon its disaffirmance.

The doctrine of *ultra vires* is not favored when asserted for the purpose of accomplishing a wrong, and to defeat compensation for things done and benefits received; but it is greatly favored when used to prevent the perpetration of unauthorized acts not yet done.

Duties owing to the public and the public welfare itself, are the controlling principles in determining the validity of combinations; thus examined they are not necessarily injurious nor illegal.

Competition is not always advisable. At times it is injuri-

ous, and to check it may be beneficial. Combinations may be legal, provided they prevent injurious competition, without creating monopolies or unreasonable prices, or preventing the discharge of duties owing to the public.

### SECTION ONE.

**Manchester & Lowell R. R. v. Concord R. R.** (Supreme Court of New Hampshire, Hillsborough, March 14, 1890), — N. H. —; 20 Atl. Rep. 883.

**Injurious competition may be prevented: Plea of *ultra vires*, for the purpose of protecting a party in retaining the fruits of the contract, is not favored.**

This was a bill, filed in 1887, to require defendant to make discovery and account of its dealings in relation to plaintiff's railroad, which defendant held and operated under contract and lease from plaintiff made in 1860. Plea of *ultra vires*<sup>1</sup> interposed and held bad.

Following is the opinion in full:

"BLODGETT, J. This proceeding is a bill in equity for a discovery and an accounting of the defendant's dealings with the plaintiff's railroad properties from December 1, 1856, to July 1, 1887, under various contracts and leases; for the delivery of certain books, records and papers alleged to belong to the plaintiff; for the return to it of rolling-stock and equipments of the appraised value of \$147,592, which went into the defendant's possession at the time it took the plaintiff's road, and which it still retains; and for the determination and adjustment of the respective rights of the parties of and to certain lands, depots and tracks situate in Manchester. In bar to the plaintiff's right to a recovery the defendant files three special pleas, and, as to the matters in the bill not covered by the pleas, it demurs. The plaintiff demurs to the pleas.

"The first plea avers that the contracts between the parties, under which the defendant went into and retained the possession and management of the plaintiff's road for more than thirty years were wholly beyond the corporate power of either

<sup>1</sup>For a more recent and comprehensive discussion of "*ultra vires*" 8d Ed., Vol. 2, Chapter XL. consult "Cook on Stock and Stock-

party to make or to ratify, and that therefore the defendant should be hence dismissed with its costs and charges. In other words, not denying that it has received the full benefit of the performance of the contract by the plaintiff, the defendant says that it should in equity be permitted to retain the benefit and property so acquired, and be dismissed with costs, because it was not empowered by its charter to perform what it promised the plaintiff in return. The demurrer to this plea is sustained. The defense set up is so repugnant to the natural sense of justice, so contrary to good faith and fair dealing, and so opposed to the weight of modern authority, that it need only be said that, in equity at least, neither party to the transaction *ultra vires* simply will be heard to allege its invalidity while retaining its fruits. However the contractual power of the defendant may be limited under its charter, there is no limitation of its power to make restitution to the other party whose money or property it has obtained through an unauthorized contract, nor as a corporation is it exempted from the common obligation to do justice which binds individuals; for this duty rests upon all persons alike, whether natural or artificial.

“The second plea avers, and the demurrer of course admits, that at the time of the making of the contracts between the parties, and of the dealings thereunder, their respective roads ‘were rival and competing railroads, by the competition of which the prices of transportation thereon were, and, but for said supposed contracts and business, would have continued to be, materially reduced; and said alleged contracts, dealings, transactions and business were made and had for the purpose of destroying and preventing such competition, and did destroy and prevent it.’ It will be noticed that there is no averment in the plea that the purpose of the contracts was to raise the prices of transportation above a reasonable standard, or that they did have this effect, or that the public were prejudiced by their operation in any manner; and that the naked question presented is whether all contracts between rival railway corporations which prevent competition are necessarily contrary to public policy, and therefore *mala prohibita* and illegal in themselves. To state this question is to answer it in the negative, because it is obvious that the illegality depends on circumstances. While without doubt contracts which have a direct tendency to prevent a healthy

competition are detrimental to the public, and consequently against public policy, it is equally free from doubt that when such contracts prevent an unhealthy competition, and yet furnish the public with adequate facilities at fixed and reasonable rates, they are beneficial, and in accord with sound principles of public policy. For the lessons of experience, as well as the deductions of reason, amply demonstrate that the public interest is not subserved by competition which reduces the rate of transportation below the standard of fair compensation; and the theory which formerly obtained, that the public is benefited by unrestricted competition between railroads, has been so emphatically disproved by the results which have generally followed its adoption in practice, that the hope of any permanent relief from excessive rates through the competition of a parallel or rival road may, as a rule, be justly characterized as illusory and fallacious. Upon authority, also, arrangements and contracts between competing railroads, by which unrestrained competition is prevented, do not contravene public policy. *Hare v. Railroad Co.*, 2 Johns. & H. 80, is directly in point. In that case a bill in chancery had been brought by a stockholder in the defendant company to annul an agreement between two railway companies to divide the profits of the traffic in fixed proportions; and it was admitted there, as it is here, that the purpose of the agreement was to prevent competition.

“In dismissing the bill Vice-Chancellor Wood said (page 103): ‘With regard to the argument against the validity of the agreement, I may clear the ground of one objection by saying that I see nothing in the alleged injury to the public arising from the prevention of competition. \* \* \* It is a mistaken notion that the public is benefited by pitting two railway companies against each other till one is ruined, the result being at last to raise the fares to the highest possible standard.’ So, also, in 1 Redf. R. R., § 146, par. 2, it is said: ‘There is no principle of public policy which renders void a traffic arrangement between two lines of railway for the purpose of avoiding competition.’ And Mr. Morawetz says, in his admirable treatise on corporations: ‘Public policy clearly does not demand that railroad companies operating competing lines shall engage in strife causing their financial ruin; and so far as agreements among companies are designed to effect this result

their purpose is not injurious to the public or illegal. Moreover, such agreements are positively beneficial to the public, so far as they prevent the fluctuation of rates and unjust discriminations among shippers, which invariably attend the unrestricted competition of rival companies. It is therefore impossible to support the proposition that all agreements among railroad companies which restrict competition are condemned by law. Some such agreements may be contrary to public policy, and unlawful; but if an agreement of this character is a reasonable business arrangement to protect the shareholders and creditors of the companies from loss, and does not cause unreasonably high charges or violate any duty which the companies owe to the public, it should be sustained and enforced by the courts.' Morawetz, Corp. (2d ed.), § 1131. In the same section, in speaking of contracts in restraint of trade (to which many of the authorities and much of the argument for the defendant relate), he says: 'Even if there were such a rule, as has been claimed, applicable to competition in trade, the principle and policy of the rule would not be applicable to traffic arrangements designed merely to prevent ruinous competition and wars among railroad companies. The main objection which has been urged against combinations restraining competition in trade, namely, that such combinations tend to produce monopolies and cause extortion, has no application to combinations among railroad companies, for railroad companies are prohibited by law to charge more than reasonable rates. It should be observed also that competition among railroad companies has not the same safeguards as competition in trade. Persons will ordinarily do business only when they see a fair chance of profit; and if press of competition renders a particular trade unprofitable, those engaged in that trade will suspend or reduce their operations, and apply their capital and labor to other uses, until a reasonable margin of profit has been reached. But the capital invested in the construction of a railroad can not be withdrawn when competition renders the operation of the road unprofitable.

"A railroad is of no use except for railroad purposes; and if the operation of the road were stopped the capital invested in its construction would be wholly lost. Hence it is for the interest of a railroad to operate its road, though the earnings are barely sufficient to pay the operating expenses. The



ownership of the road may pass from the shareholders to the bondholders, and be of no benefit to the latter; but the struggle for traffic will continue so long as the means of paying operating expenses can be raised. Unrestricted competition will thus render the competitive traffic wholly unremunerative, and will cause the ultimate bankruptcy of the companies unless the portion of their traffic which is not the subject of competition can be made to bear the entire burden of the interest and fixed charges.' The application of these principles to the plea under consideration is patent and decisive. The geographical location and relative resources of the two roads were such as to render it obvious that the plaintiff could not reasonably hope to successfully compete with its more powerful rival. The alternatives presented, it may safely be assumed, were combination or ruinous competition. It accepted the former; and as the combination did not, so far as appears by the pleadings, raise the rate of transportation above the standard of fair compensation, or violate any duty that is owing to the public from roads which are non-competing, there is nothing averred in the plea which bars the right of the plaintiff to an accounting with the defendant. Numerous cases have been cited in behalf of the defendant in support of its proposition that the combination between the parties must be regarded as void at common law because against public policy. For want of time it is quite impossible to go through and comment upon these cases in detail, as has been done in the last brief for the plaintiff; but it is sufficient to say in general terms, as is there said, that they are cases of contract in restraint of mercantile business; or cases of contract which attempt to derogate from the right of eminent domain inherent in the state; or cases where contracts between railroad companies were held contrary to public policy because one of the parties attempted to bind itself not to perform duties incident to the legal character of common carriers or public servants; or cases where contracts between railroad companies were held contrary to public policy because one of the parties agreed not to build or to cease to operate a road which it was chartered to build or operate; or cases between railroad companies which have been held illegal merely on the ground that they were *ultra vires*—in short, they do not establish a rule which fairly includes a case like the one at the bar. The demurrer to the second plea is sustained.

“The averment in the third plea is, ‘that during all the time from said December 1, 1856, until July 1, 1887, the roads of the plaintiff and defendant each constituted a part of the different lines of route for public travel and transportation between cities and towns within and without this state, forming rival and competing lines of route between such points.’ This plea is understood to be based upon the statute of July 5, 1867, entitled ‘An act to prevent railroad monopolies,’ and providing, among other things, ‘that two or more railroad corporations chartered by the legislature of this state, constituting the whole or parts of different lines of route for public travel and transportation between any two cities or towns, or between any city and town, either within or without this state, forming rival and competing lines of route between such points, shall not be allowed to consolidate such roads or lines; and neither of said lines, or any road or roads composing the same, shall be run or operated by any such rival and competing line, or any road or roads, portion thereof, under any business contract, lease or other arrangement, but each and every railroad corporation so situated shall be run, managed and operated separately by its own officers and agents, and be dependent for its support on its own earnings from its local and through business in connection with other roads, and the facilities and accommodations it shall afford the public for travel and transportation under fair and open competition, unless such lease, contract or arrangement be first authorized by the legislature, and approved by the governor and council.’ When this act was passed, the contract in force between the parties, and under which the roads were then being operated, was that of December 27, 1860; and the claim of the defendant is that whatever may be said with reference to the prior contracts and to the operation of the roads under them up to the time of the passage of the act of 1867, that act rendered the further execution of the contract of December 27th illegal and prohibited it. This point is well taken. Whatever may now be the sentiment of New Hampshire in respect to the operation of railroads, since the results attendant upon consolidation have been sufficiently demonstrated to remove any intelligent fear of extortion in rates or deterioration of service, there can be no doubt that in 1867 its sentiment was in favor of independent and competing lines, and that the pur-

pose of the legislature was to make the act in question an effective instrumentality against the consolidation of competing roads through contracts or arrangements between them, by means of which competition is removed. *Currier v. Railroad Corp.*, 48 N. H. 325; *Fisher v. Railroad Co.*, 50 Id. 208. The act, of course, had no *ex post facto* application, and was therefore of no effect as to anything which had already been done by the parties under the contract of December 27th, but it prohibited them from further operating the roads under that contract (unreported opinion of Bellows, J., in *Currier v. Railroad Co.*, December Law Term, 1871), and so far rendered it void as to deprive either party of the right of recovering expressly for its subsequent breach.

“Nevertheless, we do not think the defendant is entitled to retain the money or other property so acquired, and for which it rendered no corresponding equivalent to the plaintiff in return, but, on the contrary, we are of the opinion that it is its duty to make equitable compensation and restitution, and that the duty may be enforced in this proceeding. It is true that, in general, where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity will not interpose to grant relief; but this is so when the parties stand on equal footing; for the doctrine everywhere running through the books is that relief will be granted when both parties are *in delicto*, provided they do not stand *in pari delicto*. See Story, Eq. Jur. (12th ed.), §§ 298, 300. These parties do not so stand; for however guilty the plaintiff may have been in permitting or concurring in the illegal operation of its road by the defendant after the act of July 5th, its guilt must fairly be regarded as far less in degree than that of its associate in the offense. And that the legislature regarded the defendant as the greater offender is made entirely plain by the fact that the only penalty prescribed by the act of July 5th for the violation of its provisions is imposed upon the road which is operated; for the reading of the second section is that ‘in all cases where any road, its directors, officers or agents, shall hereafter enforce or attempt to enforce or exercise any authority over any other road, situated as provided in said first section, or do any act in conflict with said first section, such officers or agents shall severally be subject to a fine or liability not exceed-

ing \$500 for each offense, to be recovered by action of debt, or by information or indictment, for the use of the county within which such suit shall be instituted.' These considerations, as well as others of a kindred character which need not be adverted to, bring the case fully within the exception to the general rule, that equity will not grant relief to parties concerned in illegal transactions; and if this be so, it is the end of the case as regards the questions raised by the pleas; because if the transactions between the parties were of the character which the defendant now ascribes to them, the plaintiff not being *in pari delicto*, is entitled to participate in the property accumulated or its proceeds, which, as between the parties, will be divided according to equity; and it has not been argued to the contrary in the defendant's behalf. There is, however, another ground of relief, which should be briefly mentioned. The contracts have been executed on the part of the plaintiff; they were not immoral; and they were illegal only so far as they were prohibited by statute. Taking this to be so, and regarding the parties as truly *in pari delicto*, the case still falls within the general rule, 'that if an agreement is legally void and unenforceable by reason of some statutory or common-law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances, the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the court should refuse to grant relief in the case.' *Morawetz, Corp.*, § 721.

"He adds: 'These doctrines have been applied repeatedly in suits arising out of contracts entered into by corporations, although prohibited by statute or by the common law; and although the contracts were held illegal and unenforced in these cases, a recovery was allowed to the extent of the consideration received.' Citing *White v. Bank*, 22 Pick. 181; *Dill v. Wareham*, 7 Metc. (Mass.) 438; *Episcopal Soc. v. Episcopal Church*, 1 Pick. 373; *Whitney v. Peay*, 24 Ark. 22; *Loan Co. v. Towner*, 13 Conn. 249; *Foulke v. Railroad Co.*, 51 Cal. 365; *Farmers' Loan & Trust Co. v. St. Joseph, etc. R. Co.*, 1 McCrary, 247; 2 Fed. Rep. 117; *Madison Ave. Baptist Church v. Baptist Church*, 73 N. Y. 82; *Tracy v. Talmage*, 14 N. Y. 162,

175, 195; *Bank v. Codd*, 18 N. Y. 240; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490, 496; *Vanatta v. Bank*, 9 Ohio St. 27; *Express Co. v. Lucas*, 36 Ind. 361. See, also, *Pratt v. Short*, 79 N. Y. 437, 445; *Owen v. Davis*, 1 Bailey, 315; *Gilliam v. Brown*, 43 Miss. 641, 644; *W. U. Tel. Co. v. Union Pac. R. Co.*, 1 McCrary, 558, 562; 3 Fed. Rep. 423; *Lewis v. Alexander*, 51 Tex. 578; *Brooks v. Martin*, 2 Wall. 70, and cases cited; *Planters' Bank v. Union Bank*, 16 Wall. 483, and cases cited; *Central Trust Co. v. Ohio Cent. R. Co.*, 23 Fed. Rep. 306.

“The leading case of *Brooks v. Martin* was a bill in equity for an account of profits between the parties under an executed partnership contract for the purchase and location of soldiers' land warrants, ‘confessedly against public policy,’ as well as in violation of the express provision of an act of congress; but the court held that the partner in whose hands the profits were could not refuse to account for or divide them on the ground of the illegal character of the original contract, saying (Miller, J., page 80): ‘It is to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of these funds to refuse to do equity to his partner, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner, or what rule of public morals will be weakened by compelling him to do so. \* \* \* The transactions which were illegal have become accomplished facts, and can not be effected by any action of the court in this case.’ We are aware that the doctrine of this case has been criticised, and perhaps denied, by some of the state courts; but it was reaffirmed in *Planters' Bank v. Union Bank*, *supra*, and is not found to have been changed or modified in any subsequent decision. It requires no words to apply the doctrine of *Brooks v. Martin* to the present case: it applies itself. Nor do we find that its application involves any immorality, or that it is forbidden by any other reasons of public policy. Doubtless a court of equity is not positively bound to interfere in cases of this description, and may exercise its discretion; but it is peculiarly the office of equity to do justice, and justice manifestly

requires that the defendant should not keep any part of the plaintiff's equitable share of the property it obtained from operating plaintiff's road, whether legally or illegally. Whatever the legislature may have intended to accomplish by the anti-monopoly act of 1867, there is no reason to suppose their intention was to reward the Concord railroad for its violation. And, however it may once have been, it is certainly difficult to see how public policy is subserved by allowing the addition of a private wrong to a public wrong, which necessarily results when, without any equivalent in return, one party to an executed illegal transaction excludes the other from participating in the proceeds; and we entirely fail to appreciate the morality which denies in such cases any rights to the party whose money or other property has been thus appropriated by his associate, contrary to express agreement and common honesty, and which in conscience the benefited party can not retain. The demurrer to the third plea is also sustained.

"Various causes of demurrer to the bill are assigned by the defendant, but at the argument only the one relating to discovery was insisted upon, or need be considered. The bill prays 'that the defendant be ordered to make a full, accurate and true discovery and disclosure of all and singular the matters and things herein set forth.' This is the usual prayer for a discovery, and no objection to its sufficiency is perceived. It is immaterial that the prayer concludes with a request that the 'defendant be required, but not under oath, \* \* \* to discover and state, fully and with particularity,' certain things specified; for, if the word 'answer,' which it is said was intended to be used, is substituted for 'discover,' the first objection of the defendant, that a prayer for a discovery not under oath can not be granted, is readily obviated.

"The second objection, that the policy of the law exempts the defendant and its officials from discovery, is based wholly upon the unfounded assumption that the plaintiff's action is against public policy, and has already been sufficiently considered.

"The third and last objection is that the fundamental law does not require the defendant to discover. The argument in its support is that the defendant is charged with the doing of that which was positively prohibited by an act of July 5, 1867; that, if the charge is sustained, each of the defendants is liable



to the penalty prescribed by that act; and that they are asked to make a discovery of facts which, in any event, would tend to fix their penal liability under that act, contrary to the constitutional provision that 'no subject shall \* \* \* be compelled to \* \* \* furnish evidence against himself.' This objection is unavailing. See *Currier v. Railroad Corp.*, 48 N. H. 322. Of course the defendants are not obliged to discover any matters that may expose them to the penalty of the act of 1867; but they can not do so, however willing they may be, because prosecution under that act is barred by the statute of limitations. The transactions between the parties as to which discovery is sought ended July 1, 1887, and section 10, chapter 266, General Laws, provides that 'all prosecutions founded upon any penal statute, which are wholly or in part for the use of the prosecutor, shall be brought within one year, and all other suits and prosecutions thereon within two years after the commission of the offense, unless otherwise specially provided.' The demurrer is overruled. Case discharged.<sup>1</sup>

"SMITH, J., did not sit. The others concurred."

<sup>1</sup> In this connection the following may be consulted:

It is not contrary to public policy nor to the interstate commerce act to divide territory between parallel railroad lines in which neither company will interfere with the other in constructing new lines. It prevents unprofitable construction wars and really aids in opening new territory (exhaustive opinion and citations). *Ives v. Smith*, 3 N. Y. Supp. 645.

A lease for nine hundred and ninety-nine years on a portion of a road not interfering with lessor's capacity to perform its public duties will be specifically enforced (suit in this instance is brought by the lessee). *Chicago, Rock Island & Pacific R. R. Co. v. Union Pacific Ry. Co.*, 47 Fed. Rep. 15; affirmed, 51 Fed. Rep. 309, S. C., 2 C. C. A. 174, with most exhaustive briefs and opinion, reviewing numerous cases.

A contract retiring a competing steamboat is valid; the route remains open to all others, no monopoly is created; competition is not always beneficial; the contract was necessary for the survival of the other company. *Leslie v. Lorillard*, 110 N. Y. 519; 18 N. E. Rep. 363.

It is not contrary to "Anti-trust" act of 1890 for railroads to form a traffic arrangement, so long as they do not illegally limit competition; it differs from a "pool" (which divides the earnings in a fixed proportion), for it simply establishes rates and leaves each road the incentive to accommodate the public, and by individual enterprise to earn as much as possible. *United States v. Trans-Missouri Freight Association* (exhaustive opinion by Riner, D. J.), 58 Fed. Rep. 440.

This decision was affirmed by the circuit court of appeals. 58 Fed. Rep.

58; 7 C. C. A. 15 (Sanborn, C. J., and Thayer, D. J., concurring; Shiras, D. J., dissenting).

Majority opinion proceeds on the theory that the "Anti-Trust Act" (26 Stat. 209, ch. 647; R. S., Supp. 762) is inapplicable, for it should be limited to such trade combinations as were obnoxious to common law; that railway combinations are aimed at by the "Interstate Commerce Act" (24 Stat. 879, ch. 104; R. S., Supp. 529), and hence are to be deemed legal so long as not violating the same; and that the arrangement in question tended to produce fairer, more uniform and more stable rates, and altogether better service to the public.

The briefs (by the most eminent of counsel) and the opinions in this case cover some ninety pages, and present in themselves a most elaborate and instructive treatise on the points involved.

Citations in the opinions present some of the cases given elsewhere in this book, and also, among others, illustrate with *Whitaker v. Howe*, 8 Beav. 383 (lawyer not to practice in Great Britain for twenty years, held valid); *Mallon v. May*, 11 Mees. & W. 652, 667 (surgeon-dentist may be restrained as to London, but not as to other towns where the plaintiff might have been practicing); *Cloth Co. v. Lonsont*, L. R. 9 Eq. 345 (restraint enforced against manufacture or sale anywhere in Europe of a certain kind of leather); *Thermometer Co. v. Pool*, 51 Hun, 157, 163; 4 N. Y. Supp. 861 (restraint enforced not to sell thermometers or storm-glasses throughout the United States for ten years); *Chicago, etc. v. Pullman S. C. Co.*, 139 U. S. 79; 11 S. C. Rep. 490 (fifteen years' exclusive right to Pullman company to furnish cars to railroad company sustained).

Cases invoked by the government's counsel are as a rule those involving

contracts "of competing producers or dealers to limit the supply and enhance the price of or to monopolize staple commodities. *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.*, 14 N. Y. Supp. 277; *Stewart v. Transportation Co.*, 17 Minn. 872; *People v. Fisher*, 14 Wend. 9; *Hooker v. Vandewater*, 4 Denio, 849, 853; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 178; *India Bagging Ass'n v. B. Kock & Co.*, 14 La. Ann. 168; *United States v. Jellico Mountain Coal & Coke Co.*, 46 Fed. Rep. 432; *Lumber Co. v. Hayes*, 76 Cal. 887; 18 Pac. Rep. 891; *Salt Co. v. Guthrie*, 85 Ohio St. 666; *People v. N. R. Sugar Refining Co.*, 54 Hun, 854; 7 N. Y. Supp. 406.

Or cases involving pooling contracts, like *Craft v. McConoughy*, 79 Ill. 346; *Stanton v. Allen*, 5 Denio, 434; *Anderson v. Jett* (Ky.), 12 S. W. Rep. 670; *Gibbs v. Gas Co.*, 130 U. S. 396; 9 S. C. Rep. 553; *Morrill v. Railroad Co.*, 55 N. H. 531; *Denver & N. O. Ry. Co. v. A., T. & S. F. R. Co.*, 15 Fed. Rep. 650; *Woodruff v. Berry*, 40 Ark. 252.

Or cases involving combinations of workmen which compelled non-members to abide by the combination prices or abandon their employment, like *People v. Fisher*, 14 Wend. 9; *United States v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994, 1000.

Or cases where the contracts were *ultra vires* of the corporations, and their purpose and effect to monopolize trade, like *Railroad Co. v. Collins*, 40 Ga. 582; *Hazelhurst v. Railroad Co.*, 43 Id. 13; *W. U. Tel. Co. v. Am. U. T. Co.*, 65 Id. 160.

Or cases of questionable authority, like *Com. v. Carlisle*, Brightly, N. P. 36, 39.

*Contra*, see *Snow v. Wheeler*, 118 Mass. 179, 185; *Bowen v. Matheson*, 14 Allen, 499; *Skrainka v. Scharring-*



hausen, 8 Mo. App. 522; Carew v. Rutherford, 106 Mass. 1.

True doctrine, past or present, is not to apply an inflexible rule, not even to contracts in general restraint, but to sustain them if reasonable. Mitchell v. Reynolds (1711), 1 P. Wms. 181; 1 Smith's Lead. Cases (7th Am. ed.), pt. 2, p. 708 (baker restrained for three years from parish of St. Andrews, valid); Tallis v. Tallis, 1 El. & Bl. 391 (canvassing publisher held restrained from London, and one hundred and fifty miles from it. Dublin and Edinburgh, and fifty miles from either, and from any town where covenantor or his successors had an establishment or might have had one within six months preceding).

Mogul S. S. Co. v. McGregor, Gow. & Co., 21 Q. B. Div. 544, 23 Q. B. Div. 598, App. Cas. 1892, p. 25, House of Lords (combination of steamship owners between London and China sustained, though it, by allowing rebates to shippers, practically excluded the plaintiffs, who were competing carriers, from the trade).

Perkins v. Lyman, 9 Mass. 522 (merchant may bind himself not to be interested in any voyage to the north-west coast of America). See, also, Match Co. v. Roeber, 106 N. Y. 473; 13 N. E. Rep. 419; Navigation Co. v. Winsor, 20 Wall. 64; Manchester, etc. Co. v. Concord R. Co. (N. H.), 20 Atl. Rep. 383.

For further authorities to the point that the test lies not in the existence of the restriction but in the reasonableness of the restriction, see Fowle v. Park, 131 U. S. 88; 9 S. C. Rep. 658; Gibbs v. Gas Co., 130 U. S. 396; 9 S. C. Rep. 553; *Re* Greene, 52 Fed. Rep. 104; Horner v. Graves, 7 Bing. 735; Hubbard v. Miller, 27 Mich. 15; Rousillon v. Rousillon, 14 Ch. Div. 351; Cloth Co. v. Lonsont, L. R. 9 Eq. 345; Wickens v. Evans, 3 Younge & J. 318; Ontario Salt Co. v. Mer-

chants' Salt Co., 18 Grant's Ch. 540; Mallon v. May, 11 Mees. & W. 652; Whittaker v. Howe, 8 Beav. 383; Kellogg v. Larkin, 3 Pin. 123; Beal v. Chase, 31 Mich. 490; Skrainka v. Scharringhausen, 8 Mo. App. 522; Wiggins F. Co. v. C. & A. R. Co., 73 Mo. 389; Gloucester v. R. C. Co., 154 Mass. 92; 27 N. E. Rep. 1005; Association v. Walsh, 2 Daly, 1; Hodge v. Sloan, 107 N. Y. 244; 17 N. E. Rep. 385; Brown v. Rounsavell, 78 Ill. 589; Jones v. Clifford's Ex'rs, 5 Fla. 510.

True it is in some cases expressions are found that railroad companies are *quasi*-public corporations, and any restrictions upon them are contrary to public policy. Gibbs v. Gas Co., 130 U. S. 396; 9 S. C. Rep. 553; West Va. T. Co. v. Ohio R. P. L. Co., 22 W. Va. 600; Chicago G. & C. Co. v. People's Gaslight & Coke Co., 121 Ill. 530; 13 N. E. Rep. 169; W. U. T. Co. v. Am. U. T. Co., 65 Ga. 160. But in all these cases the contracts in fact created monopolies and suppressed healthy competition, or disabled the party from performing its duty to the public. (Compare Union Pacific Ry. Co. v. C., R. I. & P. Ry. Co., 51 Fed. Rep. 309; 2 C. C. A. 174.) No such features are found in the contracts under review.

Shiras, D. J., dissents, citing Railway Co. v. Goodridge, 149 U. S. 680; 13 S. C. Rep. 970, which shows that the purpose of the "Interstate Commerce Act" was to cut up by the roots the entire system of rebates; that being its main purpose, it can not be held as changing the relation of the people to the railroads so as to make said act the sole control over the latter; hence they are to be deemed as also fully under the terms and control of the "anti-trust" act. He concludes his exhaustive and powerful opinion thus: "In my judgment, the right to insist upon free competition between railway companies en-

gaged in carrying on interstate commerce is a right which belongs to the public, of which it can not be deprived except by its own consent; and every contract or combination between these public corporations which tends to remove the business carried on by them from the influence of free competition tends to deprive the public of this right, of necessity tends to subject interstate commerce to the burdens which are a restraint thereon, is inimical to the public welfare, is contrary to public policy, and in contravention of both the language and spirit of the anti-trust act of July 2, 1890."

"Pooling" arrangement, shown to have the purpose of suppressing competition and to establish rates without regard to reasonableness, is condemned in *Chicago. M. & St. P. Ry. Co. v. Wabash, S. L. & P. Ry. Co.*, 61 Fed. Rep. 993; S. C., 9 C. C. A. 659.

## SECTION TWO.

*Camden & A. R. Co. v. May's Landing, etc., Co.*, 7 Atl. Rep. 523; 48 N. J. L. 530.

**Illegal lease sustained on the ground of having been executed.**

In 1873 the May's Landing & E. H. C. R. Co. leased its road for nine hundred and ninety-nine years to the Camden & A. R. Co. This action is brought for rent accruing from February, 1881, to June 1, 1882, under said lease. The lessee had possession of the road from the time it was built in 1871 until February 1, 1881, at which time it refused to further operate the road or recognize the lease. The lessor road claims authority, under section 17 of its charter, to lease or consolidate its road, and which authorizes any other road to accept such lease; but as such power of acceptance is not mentioned in the title to the act, the act is unconstitutional<sup>1</sup> so far as concerns the power of other roads to accept. The title relates only to the incorporation of the lessee road.

The lessee road had the power by its charter to construct this road; hence it had the implied right to buy the same particular road if constructed by some one else,<sup>2</sup> and consequently it had also the right to take it on a nine hundred and ninety-nine year lease, as such right co-exists with the right to purchase; but said right to construct was limited to August 1, 1862, and as the road was not constructed by that time, the power and authority so to do became void by the express terms of the

<sup>1</sup> *Jersey City v. Elmendorf*, 87 N. J. L. 283.

<sup>2</sup> *Branch v. Jesup*, 106 U. S. 468; S. C., 1 S. C. Rep. 495.

statute; just as the power of eminent domain given to a corporation ceases at the end of the term limited for its exercise.<sup>1</sup> It follows, therefore, that the lessee's act in attempting to accept the lease was *ultra vires*. A contract *ultra vires*, if executory, can not be validated even by the acquiescence of all the stockholders;<sup>2</sup> but if fully executed can not be receded from.<sup>3</sup> It has been held that *ultra vires* is not a good plea in a suit for an amount advanced as the price of a steamboat, though the plaintiff, when he advanced the money with which the boat was purchased, knew all the facts.<sup>4</sup> Acts *ultra vires*, but affecting only the interests of the stockholders, may be made good, when the rights of innocent third persons are concerned, either by the consent or the acquiescence of the stockholders.<sup>5</sup> The court then reviews other cases<sup>6</sup> in which the plea of *ultra vires* was not allowed to prevail, and calls attention to some in which it prevailed,<sup>7</sup> and reaches the conclusion that when a transaction is complete and the party which has performed it can not be placed *in statu quo*, the other, which has acquiesced therein, should not be allowed to plead *ultra vires* when sued for not performing its side of the contract. The question is different when the state accuses a corporation of going beyond its powers.

<sup>1</sup> Morris & E. R. R. v. Central R. R., N. Y. 62; Woodruff v. Erie R. Co., 93 81 N. J. L. 205. Id. 609; Bradley v. Ballard, 55 Ill.

<sup>2</sup> Ashbury R. C. & I. Co. v. Riche, 418; Terry v. Eagle Lock Co., 47 L. R. 7 H. L. 653, distinguished in 78 Conn. 141; Steamboat Co. v. McCutcheon, 13 Pa. St. 13; Darst v. Gale, N. Y. 187, on the ground of having 83 Ill. 187; Ward v. Johnson, 95 Id. been prohibited by parliament. Compare, also, Spackman v. Evans, L. R. 215; Peoria Road v. Thompson, 103 3 H. L. 171, and Evans v. Smallcombe, Id. 187; Amerman v. Wills, 24 N. J. Id. 249. Eq. 13.

<sup>3</sup> Field on Corp., pars. 263, 264; Greene's Brice's Ultra Vires, 371-373; 1 Wood's Ry. Law, pars. 171-173; Thomas v. Railroad Co., 101 U. S. 71. <sup>4</sup> Thomas v. Railroad Co., 101 U. S. 71, in which, however, the lease was held contrary to public policy, and by its cancellation the lessor was put *in statu quo*; Mutual Life & Fire Ins. Co. v. McKelway, 12 N. J. Eq. 133, which was a proceeding on the part of incorporators who had not acted upon the strength of the unauthorized contract.

<sup>5</sup> Parish v. Wheeler, 22 N. Y. 494. See, also, Bissell v. Michigan Southern R. Co., 22 N. Y. 258.

<sup>6</sup> Kent v. Quicksilver Min. Co., 78 N. Y. 159.

<sup>7</sup> Whitney Arms Co. v. Barlow, 68

If the question is merely between the parties to the alleged contract, although it can not be said that the power existed to enter into it, or that the power originally granted has in any way been amplified, yet it can and must be said that the party is estopped from setting up its own incapacity to act after having received the fruits of the bargain, so long as the transaction involves nothing immoral, illegal, forbidden by statute or contrary to public policy. Moreover, the judgment should be allowed for the rent in this case, because the lease must be regarded as fully executed on both sides, the same as those unauthorized contracts in which money has been loaned to or work done for a corporation for which it has issued its bonds to the creditor. In 1871 the lessee road agreed that if the lessor would build the same, it, the lessee, would guarantee the lessor's bonds thereon and would take the nine hundred and ninety-nine year lease. The acts were done and were annually reported until 1879, with the incomes and expenditures resulting therefrom, and no attempt was made by any stockholder to avoid the lease. Thus it is seen the road was not built for the lessor at all, but by it for the lessee, at the latter's instance, and with proceeds of bonds by the latter guaranteed. The lessor has done all it was to do, and has put the lessee in possession. This distinguishes the case from the Thomas case.<sup>1</sup>

The lease for nine hundred and ninety-nine years is practically an absolute transfer; the rent is merely another method for repaying the lessor for the work and money expended instead of paying a fixed sum. The judgment below allowing the recovery of the rent should be affirmed.

Dixon concurs in affirming, but on the ground that the defendant can not set up that its own charter has become void under the expiration of said section 17 so long as it continues to exercise the powers granted by the charter; it need not be considered what the result would be if some one else than the corporation itself asserted such invalidity.

Depue and Knap, JJ., dissent, reviewing the authorities

<sup>1</sup> 101 U. S. 76. See also *Central Trust Co. v. Ohio C. R. Co.*, 23 Fed. Rep. 306. A "pooling" contract having created a fund which came into the hands of a receiver, he will be ordered to divide it among the companies in the agreed proportion, regardless of the original validity or invalidity of said contract.

cited in the principal opinion and a number of others,<sup>1</sup> and arriving at the apparently sound conclusions that in none was any recovery allowed except as to the consideration actually received; that a lease is a continuing contract as to rent, as also to occupancy. The plaintiff had notice of defendant's incapacity to act, and took the risk of its abandoning the contract; and the plaintiff has been paid all rent in full that has accrued, and has been restored to *statu quo* by receiving back the road in as good condition as when given to the lessee; the only loss to plaintiff is in not getting the expected profits in the future, and this presents no legal ground of recovery.<sup>2</sup>

### SECTION THREE.

**Zabriskie v. Cleveland, Columbus & Cincinnati R. R. Co., 23 How. 881.**

**One company guarantees another's bonds, held valid by custom and acquiescence.**

Defendant corporation, in connection with three others, guaranteed the bonds of another railroad company, the object being to give them all a uniform gauge, to aid the latter company in its development and to promote intimate connections in their transit operations; the bonds were put upon the market and sold to innocent holders; considerable time thereafter (about three years) the plaintiff, a stockholder in defendant's company, asked for an injunction against its paying such guaranteed amount. Injunction refused; ruling affirmed, on the theory that it is a common practice for railroad companies to make similar arrangements to enlarge their connections and increase their business; the defendant company had encouraged this practice by precept and example; it had in 1854

<sup>1</sup> Morris & E. R. Co. v. Sussex R. Co., J. L. 208; McElroy v. Ludlum, 32 N. 20 N. J. Eq. 542; Ashbury R. C. & I. J. Eq. 828. It is where the actions Co. v. Riche, L. R. 9 Exch. 262; Atty. are for tort that there can be no plea Gen. v. Great Eastern Ry. Co., 5 App. of *ultra vires*. N. Y., etc., v. Haring, Cas. 473; Wenlock v. River Dee Co., 47 N. J. L. 147; Buffet v. Troy, etc., 10 Id. 854; Thomas v. Railroad Co., 40 N. Y. 168; National Bank v. Graham, 101 U. S. 71; Pennsylvania R. Co. v. ham, 100 U. S. 699.  
St. Louis, A. & T. H. R. Co., 118 Id. <sup>2</sup> Campbell v. Nichols. 4 Vroom N. 290, 630; 6 S. C. Rep. 1094; 7 S. C. J. L. 81; Phillipsburg Bank v. Fuller, 31 Id. 52.  
Rep. 24; Davis v. Old Colony R. R., 113 Mass. 258; Smith v. Smith, 28 N.

established a line of steamboats and guaranteed the bonds of other companies; reported these facts to the stockholders, and said it would continue that policy unless they disapproved thereof; but no disapprobation was manifested until after the guaranty of the bonds in question had been sanctioned; then there was discussion over it, but no legal steps were taken until the guaranteed company made default in the second installment of interest. Then the complainant filed his bill, alleging that the guaranty exceeds the power of the corporation and can not be confirmed against a dissenting stockholder.<sup>1</sup> The usual and more approved form of such a bill is that of one or more stockholders to sue in behalf of the others.<sup>2</sup>

The general law of 1851 empowered railway companies, by subscription to their stock or otherwise, to aid other companies, for the purpose of making connected lines; also to enter into any arrangement for their common benefit, subject, however, to the stockholders' approval; this was re-enacted in 1852. The defendant corporation has acted under these acts, and it can not now say that it has not accepted them, although there may have been no formal legal acceptance. If directors neglect precautions which they should attend to, and yet lead third persons to deal with the company, they, the directors, can not thereafter themselves raise the objections of their own neglect.<sup>3</sup>

This principle does not impugn the doctrine that a corporation can not vary from the object of its creation, and that persons dealing with it must take notice of whatever is contained in the law of its organization;<sup>4</sup> but the principle includes those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard. The instances and statutes cited show that the corporation acted within its general powers. If there was illegality or abuse, it should have been promptly

<sup>1</sup> *Dodge v. Wakey*, 18 How. 331; *ton*, 1 Phila. 790; *Wood v. Draper*, Mott v. Penn. R. R. Co., 30 Pa. St. 1; 24 Barb. (N. Y.) 187.

*Manderson v. Commercial Bank*, 28 Id. 379.

<sup>2</sup> *Bargate v. Shortridge*, 5 H. L. Cas. 297.

<sup>3</sup> *Bemon v. Rufford*, 1 Simon (N. S.), 550; *Winch v. Birkenhead H. Ry. Co.*, 5 De G. & S. 562; *Mosley v. Als-*

<sup>4</sup> *Pearce v. M. & I. R. R. Co.*, 21 How. 441; *Strauss v. Eagle Ins. Co.*, 5 Ohio (N. S.), 59.



exposed before innocent parties became involved.' The bill does not proceed on fraud or abuse, but against the exercise of powers that did not belong to the corporation, and which the body could not confirm except by unanimous vote.' There may have been irregularities or defects in the notices or proceedings; but from an external view these were not seen. The community had a right to judge of the matter from the published resolutions, from the bonds being placed on the open market, and from all parties acquiescing therein. Corporations as well as individuals are held to a careful adherence to truth in dealing with mankind; they can not by silence involve others, and then defeat the claims their own conduct had superinduced.

#### SECTION FOUR.

**Green Bay & Minnesota R. Co. v. Union Steamboat Co.,** 107 U. S. 98; 2 U. S. S. C. Rep. 221.

**Railroad company may guarantee income to a steamboat company to induce it to make connection.**

Action by the Union Steamboat Company against the Green Bay & Minnesota Railroad Company, alleging that the latter

<sup>1</sup>Chapman v. Mad. R. R. Co., 6 Ohio (N. S.), 119; State v. Van Horne, 7 Id. 327. ing Co. v. A. M. M. & M. Co. (also Circuit Court of Appeals, 62 Fed. Rep. 356), 10 C. C. A. 415, in

<sup>2</sup>Foss v. Harbottle, 2 How. 461; 2 Phil. Ch. R. 740. which it is held, after consideration of many cases, that an Ohio

An instructive recent case on guaranty by one corporation of the bonds of another is Marbury v. Kentucky Union Land Co., Circuit Court of Appeals, 62 Fed. Rep. 335, 10 C. C. A. 393, in which, in an opinion of some twenty pages, reviewing many authorities, it is held that under the power to a land company to buy timber lands and mines and export its product, and in furtherance thereof to make a "temporary or permanent consolidation" with any railroad company, it could guarantee the bonds of a railroad company if thereby the construction of a railway could be obtained. The court regards this, in one view of the case, as a sort of temporary consolidation. "The objection to the guaranty is that it risks the funds of the company in a different enterprise and business, under the control of another and different person or corporation, contrary to what its stockholders, its creditors and the state have the right from its charter to expect."

Quite the counterpart of the last case can be found in Humboldt Min- An extensive discussion of practically this entire topic of guaranty is found in "Cook on Stock and Stockholders and Corporation Law," 3d ed. 1894, Vol. II, Sec. 775.

was organized to and did construct a road across Wisconsin from Green Bay to the Mississippi; that it became important for the defendant to make arrangements for carrying passengers and freight further east, destined for points east of and beyond Green Bay and out of the state, also to secure business in carrying persons and freight west; hence they entered into a contract under seal, whereby the plaintiff was to run its propellers between Buffalo and Green Bay and intermediate points for the purpose of carrying passengers and freight to and from Green Bay in connection with defendant's railway, and for this the defendant guaranteed that the gross earnings of each propeller would be \$45,000 for each of the two years, and if less the defendant would pay the difference.

No bill of exceptions being tendered, the only question raised is whether the said contract was outside of the power conferred by the defendant's charter. The law is well settled that the charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers. A contract manifestly beyond those powers will not sustain an action; but whatever may be regarded as incidental to the objects for which the corporation was created is not to be taken as prohibited.<sup>1</sup> The directors of the road have power by its character to make such agreement with any person or corporation whatsoever "as the construction of their railroad or its management and the convenience and interest of the company and the conduct of its affairs may in their judgment require."<sup>2</sup>

The company had incidental power to agree to transport over connecting railroad and steamboat lines passengers and freight intrusted to it for carriage over its own lines.<sup>3</sup> The general statutes authorized railroad companies to make contracts with other railroad companies whose roads terminate on the eastern shore of Lake Michigan, to run their roads in connection with each other, and to build, construct and run as part of their corporate property such number of steamboats as may be deemed necessary to facilitate their business operations.<sup>4</sup> Wisconsin railroads are also authorized to exercise

<sup>1</sup> Thomas v. Railroad Co., 101 U.S. 71; Attorney-General v. Great Eastern Ry. Co., 5 App. Cas. 473; Davis v. Old Colony R. Co., 181 Mass. 258.

<sup>2</sup> Priv. Laws Wis. 1866, Ch. 540, § 7.

<sup>3</sup> Railway Co. v. McCarthy, 96 U. S. 258.

<sup>4</sup> Gen. Laws Wis. 1853, Ch. 76.



their power in other states, and may accept any additional powers or privileges applicable to the carrying of persons or freight by railway or steamboat in the other state.<sup>1</sup>

The legislature is thus seen to have recognized that the geographical position of the state required railroads to connect with steamboats to form a through line across the continent. The act of 1853 conferred express power to build and run steamboats, and hence, considering all the statutes, it is equally within the railroad's power to hire steamboats by the trip or season, or to employ them under a guaranty as alleged.

### SECTION FIVE.

**Railway Company v. McCarthy, 96 U. S. 258.**

**Validity of contract for through carriage.**

Suit for damages from failure by defendant to properly carry plaintiff's cattle from East St. Louis to Philadelphia; the negligence occurred on the connecting lines over which the defendant forwarded the cattle. The contract was undertaken by the defendant to forward the cattle to Philadelphia; no other company is named; no compensation is provided for any other; nothing is said about change to cars of any other company. Such corporations, unless forbidden by their charters, have the power to contract to carry the entire distance over any connecting lines.<sup>2</sup> This principle is so well settled that further citations are unnecessary.

The company is liable in all respects on the connecting line as on its own; the public has the right to assume that it has made all necessary arrangements throughout.<sup>3</sup> A contract not on its face necessarily beyond the scope of the corporation's power will, in the absence of proof to the contrary, be presumed valid. Corporations are presumed to contract within their powers. "The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."<sup>4</sup> Judgment for plaintiff affirmed.

<sup>1</sup> Gen. Laws Wis. 1872, ch. 109, § 51.      <sup>4</sup> Union Water Co. v. Murphy's Flat

<sup>2</sup> Railroad Co. v. Pratt, 22 Wall. 123. Fluming Co., 22 Cal. 620; Morris R. R.

<sup>3</sup> Great Western Ry. Co. v. Blake, Co. v. Railroad Co., 29 N. J. Eq. 542; 7 H. & N. 986; Weed v. Railroad Whitney Arms Co. v. Barlow, 63 N. Co., 19 Wend. (N. Y.) 534; Knight v. Y. 62.

Portland, etc. Co., 56 Me. 234.

## SECTION SIX.

**Railroad Company v. Pratt, 22 Wall. 123.****Same topic continued.**

Suit for loss of horses taken by defendant, a New York corporation, to be carried into Massachusetts, lost not on defendant's road, but on a Vermont road connecting therewith, and not belonging to defendant. It is held that the defendant had power to contract for the through transportation. The statute recognizes such power by providing that either of connecting lines receiving freight to be carried to any point on the other shall be liable as common carrier for the freight to such point, and, if it must pay any sum by reason of the other's neglect, may recover it from the other.<sup>1</sup> This statute is merely declaratory.<sup>2</sup>

The power to contract to make the through shipment has been sustained in New York, where the contract was made, in Massachusetts, where it was to be completed, and in Vermont, where the injury occurred.<sup>3</sup> The single exception to this holding, so far as the court is aware, is said to be in Connecticut, where the supreme court has held the contrary.<sup>4</sup> Judgment for plaintiff affirmed.

<sup>1</sup> Statutes of 1847, 299, § 9; 2 Revised Statutes (5th ed.), 693, § 67.

<sup>2</sup> Root v. Great Western R. R., 45 N. Y. 524.

<sup>3</sup> Bissell v. Michigan R. R. Co., 22 N. Y. 258; Buffet v. Troy & Boston R. R., 40 Id. 168; Root v. Great Western R. R., 45 Id. 524; Burtis v. Buffalo & St. L. R. R., 24 Id. 269; Hill M. Co. v. Boston & L. R. Co., 104

Mass. 122; Feital v. Middlesex R. R., 109 Id. 898; Noyes v. Rutland & B. R. R. Co., 27 Vt. 110; Morse v. Brainard, 41 Id. 550; Railroad Co. v. Manufacturing Co., 16 Wall. 334; Evansville, etc., R. R. Co. v. Androscoggin Mills, 22 Id. 594.

<sup>4</sup> Converse v. N. & N. Y. T. Co., 33 Conn. 166; 22 Id. 502.

## CHAPTER II.

COMBINATIONS MADE BY RAILWAY CORPORATIONS WITH  
RAILWAY OR OTHER CORPORATIONS HELD INVALID —  
THE DOCTRINE OF *ULTRA VIRES* APPLIED.

Cases herein considered present the principles that corporations owing duties to the public can not enter into any engagements disabling themselves from performing the same, unless consent be first obtained through legislative act.

The terms of such consent must be strictly followed. The enumeration of powers in such act or in a charter implies the exclusion of all others.

Invalid contractual acts, if not immoral in their nature or against public policy, if executed, may be sustained, but if executory, will not be enforced unless perhaps to estop one who has received benefits thereunder from pleading *ultra vires* against a demand for making compensation for the same.

The majority of stockholders can not, against the objections of the minority, divert the company's property from the purposes of its formation.

Doctrine of *ultra vires*, though not favored when used to defeat just compensation for things already done, is greatly favored when used to prevent the perpetration of unauthorized acts not yet done.

What can not be done directly will not be tolerated if done indirectly; a railroad can not be sold to a third party for the purpose of effecting a forbidden sale to a competing line; nor can this be accomplished by the absorption of one company of another by means of purchasing its stock, franchises and property.

Powers reserved in articles of association are to be as strictly construed as those granted in statutes; none are to be implied from mere incidental, or perhaps loose, expressions used.

Power to either make or accept a lease of a railroad prop-

erty is not among the ordinary powers, and is not to be presumed from the usual grant of powers in a charter.

Nor does it include power to engage directly, or by means of guaranty indirectly, in collateral disconnected undertakings, though for the purpose of thereby obtaining subscription to its stock.

Persons contracting with a corporation are bound to take notice of the legal limits of its capacity; excess of the same may be arrested at the instance of the government or the subscribers; nor will the courts sustain actions thereon against the corporation.

Corporate franchises, powers and property must not be appropriated to uses or purposes not contemplated or authorized by the charter; the smallest minority of the subscribers may prevent this; unless by doing so it prevents or arrests a public improvement for which sufficient compensation has been provided.

Doubts are solved against the existence of powers; a grant will not be deduced from language unless it is not susceptible of any other rational construction.

The peculiar privileges of eminent domain and assistance of taxation are the consideration to the railway companies on which are based the inalienable duties which they owe to the public.

Void acts do not become valid merely because remaining long unquestioned; there is no residuary power to confirm them; the corporations have no power to divert, from their contemplated purposes, the funds received from the public, by gift or taxation, or from the subscribers.

#### SECTION ONE.

**Thomas v. Railroad Company, 101 U. S. 71.**

**On an illegal lease no damages can be given for refusal to perform the unexpired part of the term.**

Thomas and others received a lease for twenty years from the Millville and Glassboro Railroad Company, conveying the road, buildings and rolling stock, the lessees to pay one-half of the gross sum collected from the operation of the road. Thereafter said company agreed to consolidate with and be merged

into the West Jersey Railroad Company. In November, 1867, the Millville Company gave notice of termination of the lease and that it would take possession on April 1, 1868. In March, 1868, the legislature enacted that on the fulfillment of certain conditions the Millville Company should be consolidated with the West Jersey Railroad Company "subject to all the debts, liabilities and obligations of both of said companies." The conditions were fulfilled and the road was delivered by Thomas and his associates to the West Jersey Company on April 1, 1868. The lease provided that on its termination the loss and damage of lessees should be fixed by arbitration; the lessees called for arbitration; the defendant, the West Jersey Company, at first refused to go into an arbitration, and then when an amount was thus fixed, caused it to be set aside in equity. The lessees bring this suit for such damages, and offer to prove their compliance with the lease and their damage. The court directed a verdict for defendant on the ground that the lease to the plaintiffs by the Millville Company was *ultra vires*. The Supreme Court sustains this ruling.

Following is the opinion in full:

MR. JUSTICE MILLER, after stating the case, delivered the opinion of the court.

The ground on which the court held the contract to be void and on which the ruling is supported in argument here, is, that the contract amounted to a lease, by which the railroad, rolling stock and franchises of the corporation were transferred to the plaintiffs, and that such a contract was *ultra vires* of the company.

It is denied by the plaintiffs that the contract can fairly be called a lease.

But we know of no element of a lease which is wanting in this instrument. "A lease for years is a contract between lessor and lessee, for possession of lands, etc., on the one side. and a recompense by rent or other consideration on the other." 4 Bac. Abr. 632.

"Anything corporal or incorporeal lying in livery or in grant may be the subject-matter of a lease, and, therefore, not only lands and houses, but commons, ways, fisheries, franchises, estovers, annuities, rent charges, and all other incorporeal

hereditaments are included in the common law rule." Bouv. L. D., "Lease;" 1 Wash. Real Prop. 310.

The railroad and all its appurtenances and franchises, including the right to do the business of a railroad and collect the proper tolls, are for a period of twenty years leased by the company to the plaintiffs, from whom in return it receives as rent one-half of all the gross earnings of the road. The usual provision for a right of re-entry on the failure to perform covenants in addition to the special right to terminate the lease on notice, and the usual covenant for repairs and proper running of the road, equivalent to good husbandry on a farm, are inserted in the instrument.

The provision for the complete possession, control and use of the property of the company and its franchises by the lessees is perfect. Nothing is left in the lessor but the right to receive rent. No power of control in the management of the road and in the exercise of the franchises of the company is reserved. A solitary exception to this statement, of no value in the actual control of affairs, is found in the sixth clause of the lease, which covenants that the lessee will discharge any one in their service on the request of the corporation, evidenced by a resolution of the board of directors.

But while we are satisfied that the contract is both technically and in its essential character a lease, we do not see that the decision of that point either way affects the question on which we are to pass. That question is, whether the railroad company exceeded its powers in making the contract, by whatever name it may be called, so that it is void.

It is, perhaps, as well to consider this question in the order of its presentation by the learned counsel for plaintiffs, upon whom the burden of showing the error of the Circuit Court devolved the duty of proving one of the following propositions:

1. The contract was within the powers granted to the railroad company by the act of the New Jersey legislature under which it was organized.

2. That if this be not established, the lease was afterward ratified and approved by another act of that legislature.

3. That if both these propositions are found to be untenable, the contract became an executed agreement under which the rights acquired by the plaintiffs should be legally respected.

The authority to make this lease is placed by counsel primarily in the following language of the thirteenth section of the company's charter:

"That it shall be lawful for the said company at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kind of goods, produce, merchandise, freight, or passengers, and to enforce the fulfillment of such contracts."

This is no more than saying, "you may do the business of carrying goods and passengers, and may make contracts for doing that business. Such contracts you may make with any other corporation or with individuals." No doubt a contract by which goods received from railroad or other carrying companies should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language used a permission to sell, lease, or transfer to others the entire road and the rights and franchises of the corporation. To do so is to deprive the company of the power to make those contracts which this clause confers and of performing the duties which it requires.

In *The Ashbury Railway Carriage & Iron Co. v. Riche*, decided in the House of Lords in 1875 (Law Rep. 7 H. L. 653), the memorandum of association, which, as Lord Cairns said, stands under the act of 1862, in place of a legislative charter, thus described the business which the company was authorized to conduct: "The objects for which this company is established are to make, sell, or lend on hire, railway carriages and engines, and all kinds of railway plant, fittings, machinery, and rolling stock; and to carry on the business of mechanical engineers and general contractors; to purchase and sell as merchants, timber, coal, metal, or other materials, and to buy and sell any such materials on commission or as agents." This company purchased a concession for a railroad in Belgium, and entered into a contract for its construction, on which it paid large sums of money. The company was sued afterward on its agreement with Riche, the contractor, and the contract



was held valid in the Exchequer Chamber by a majority of the judges, on the ground that while it was in excess of the power conferred on the directors by the memorandum, it had been made valid by ratification of the shareholders, to whom it had been submitted.

The House of Lords reversed this judgment, holding unanimously that the contract was beyond the powers conferred by the memorandum above recited, and being beyond the powers of the association, no vote of the shareholders, whatever, could make it valid. The case is otherwise important in its relation to the one before us, but it is cited here for its parallelism in the construction of the clause defining the powers of the company.

If a memorandum which describes the parties as engaging in furnishing nearly all the materials, machinery, and rolling-stock which entered into the construction of a railroad and its equipments, and then empowers them to carry on the business of *mechanical engineers and general contractors*, can not authorize a contract to build a railroad, surely the authority to build a railroad and to contract for carrying passengers and goods over it and other roads is no authority to lease it and with the lease to part with all its powers to another company or to individuals. We do not think there is anything in the language of the charter which authorized the making of this agreement.

It is next insisted, in the language of the counsel, that though this may be so, "a corporate body may (as at common law), do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter a shareholder may enjoin its execution; and the State may, by proper process, forfeit the charter."

We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that a charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.



This class of subjects has received much consideration of late years in the English courts, and counsel have relied largely on the decisions of those courts. Among the cases cited by both sides is *The East Anglian Railway Co. v. The Eastern Counties Railway Co.*, 11 C. B. 775.

In that case *The Eastern Counties Railway Company* had made a contract in which, among other things, it covenanted to take a lease of several other railroads, whose companies had introduced into Parliament a bill for consideration under the name of *East Anglian Railways Company*, and to assume the payment of parliamentary expenses of this act of consolidation.

This covenant was held void as beyond the power conferred by the charter. "They can not," said the court, "engage in a new trade, because they are incorporated only for the purpose of making and maintaining the *Eastern Counties Railway*. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be their object or prospect of success, they are still but a corporation for the purpose only of making and maintaining the *Eastern Counties Railway*; and if they can not embark in new trades, because they have only a limited authority, for the same reason they can do nothing not authorized by their act and not within the scope of their authority." This case, decided in 1851, was afterward cited with approval by the Lord Chancellor in 1857, in delivering the opinion of the House of Lords in *Eastern Counties Railway Co. v. Hawkes* (5 H. L. Cas. 331); and it is there stated that it was also acted on and recognized in the Exchequer Chamber in *McGregor v. The Deal & Dover Railway Co.*, 22 L. J. N. S. Q. B. 69; 18 Q. B. 618. Both these cases are cited approvingly in the opinion of Lord Cairns in the *Ashbury Company*, on appeal in the House of Lords.

This latter case, as decided in the Exchequer Chamber (Law Rep. 9 Exch. 224) is much relied on by counsel for plaintiffs here as showing that though the contract may be *ultra vires* when made by the directors, it may be enforced if afterward ratified by the shareholders or if partly executed.

But in the House of Lords, where the case came on appeal, this principle was overruled unanimously in opinions delivered by Lord Chancellor Cairns, Lords Selborn, Chelmsford, Hath-

erly and O'Hagan, and the broad doctrine established that a contract not within the scope of the powers conferred on the corporation can not be made valid by the assent of every one of the stockholders, nor can it by any partial performance become the foundation of a right of action.

It would be a waste of time to attempt to examine the American cases on the subject, which are more or less conflicting, but we think we are warranted in saying that this latest decision of the House of Lords represents the decided preponderance of authority, both in this country and in England, and is based upon sound principle.

There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires*, as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract.

That principle is that where a corporation, like a railroad company, has granted to it, by charter, a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in *The York & Maryland Line Railroad Co. v. Winans*, 17 How. 30. The corporation in that case was chartered to build and maintain a railroad in Pennsylvania by the legislature of that State. The stock in it was taken by a Maryland corporation, called the Baltimore and Susquehanna Railroad Company, and the entire management of the road was committed to the Maryland company, which appointed all the officers and agents upon it, and furnished the rolling stock. In reference to this state of things and its effect upon the liability of the Pennsylvania corporation for infringing a patent of the defendant in error, *Winans*, this court said: "This conclusion [argument] implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that

by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration to the community for their grant. The corporation can not absolve itself from performance of its obligations without the consent of the legislature. *Beman v. Rufford*, 1 Sim. N. S. 550; *Winch v. B. & L. Railway Co.*, 13 L. and Eq. 506."

And in the case of *Black v. Delaware & Raritan Canal Co.*, 22 N. J. Eq. 130, Chancellor Zabriskie says: "It may be considered as settled that a corporation can not lease or alien any franchise, or any property necessary to perform its obligations and duties to the State, without legislative authority." (P. 399.) For this he cites some ten or twelve cases in England and in this country.

This brings us to the proposition that the legislature of New Jersey has given her consent by an act which amounts to a ratification of this lease.

That act is entitled: "A supplement to the act entitled 'An act to incorporate the Millville & Glassboro Railroad Company,'" approved April 10, 1867; and its only purpose was to regulate the rates at which freight and passengers should be carried. It reads as follows:

"That it shall be unlawful for the directors, *lessees* or *agents* of said railroad to charge more than three and a half cents per mile for the carrying of passengers, and six cents per ton per mile for carrying freight or merchandise of any description, unless a single package weighing less than one hundred pounds; nor shall more than one-half of the above rate be charged for carrying any fertilizing materials, either in their own cars or cars of other companies running over said railroad. Provided, that nothing contained in this act shall deprive the said railroad company, or its *lessees*, of the provisions of an act entitled 'An act relative to freights and fares on railways in this State,' approved March 4, 1858, and applicable to all other railroads in the State."

It may be fairly inferred that the legislature knew at the time the statute was passed that plaintiffs were running the road, and claiming to do so as lessees of the corporation. It was not important for the purpose of the act to decide whether this was done under a lawful contract or not. No inquiry was probably made as to the terms of that lease, as no information on that subject was needed.

The legislature was determined that whoever did run the road and exercise the franchises conferred on the company, and under whatever claim of right this was done, should be bound by the rates of fare established by the act. Hence, without undertaking to decide in whom was the right to the control of the road, language was used which included the directors, lessees and agents of the railroad.

The mention of the lessees no more implies a ratification of the contract of lease than the word "directors" would imply a disapproval of the contract. It is not by such an incidental use of the word "lessees" in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid and ratified by the State.

It remains to consider the suggestion that the contract, having been executed, the doctrine of *ultra vires* is inapplicable to the case. There can be no question that in many instances, where an invalid contract which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property has changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred.

In regard to corporations, the rule has been well laid down by Comstock, C. J., in *Parish v. Wheeler* 22 N. Y. 494, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it.

But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the

contract that are sued for in this action. Damages for a material part of the contract never performed; damages for the value of the contract which is void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its non-performance. As to this it is not an executed contract.

Not only so, but it is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of the company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can, is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law the stronger is the claim to its enforcement by the courts.

We can not see that the present case comes within the principle that requires that contracts which, though invalid for want of corporate power, have been fully executed, shall remain as the foundation of rights acquired by the transaction.

We have given this case our best consideration on account of the importance of the principles involved in its decision, and after a full examination of the authorities we can see no error in the action of the Circuit Court. Judgment affirmed.

MR. JUSTICE BRADLEY did not sit in this case.<sup>1</sup>

<sup>1</sup> Of course, with legislative consent, a railroad company may abandon portions of its road and the legislature may even leave it to the directors to determine the portion. This is not an unconstitutional delegation of power. *Northern Co. v. Manchester Co.* (N. H.), 81 Atl. R. 17. A gas company can not lease its property and franchises. *Brunswick v. U. G. Co.* (Me.), 27 Atl. R. 525; *Visalia v. Sims* (Cal.), 37 P. R. 1042. The lessee may, however, be held for use and occupancy. *Bath Gas Co. v. Claffy*, 26 N. Y. Supp. 287. So long as no public duty has arisen, parties are free to agree not to enter into a competition, e, g., not to

compete for the right of supplying water to a city. *Oakes v. Cattaraugus W. Co.* (N. Y.), 38 N. E. R. 461.

The protection of the public is carried so far under the doctrine of the principal case that it has been held an injunction should issue at the suit of the county attorney against a railroad company's attempting to tear up its tracks without prior consent of the legislature. The road has become a public instrumentality; no one can divert it, whether it be profitable or not. Abandonment or destruction can be only with legislative consent. *State v. Dodge, etc., Co.* (Kan.), 36 P. R. 747; citing, among others, *R. R. Co. v. Casey*, 26 Pa. 287; *State v. S. C. & P. R. Co.*, 7 Neb. 357; *People v. L. & N. R. Co.*, 10 N. E. R. 657; *R. R. Com. v. P. & O. C. R. Co.*, 63 Me. 269; *P. & R. I. R. Co. v. C. V. M. Co.*, 68 Ill. 489; *Gates v. R. R. Co.*, 53 Conn. 333; 5 Atl. R. 695; *Thomas v. R. R. Co.*, 101 U. S. 71; *R. R. Co. v. Winans*, 17 How. 80; *Pierce v. Emery*, 38 N. H. 484; *People v. N. Y.*, 28 Hun 543.

Contract abandoning a portion of track but causing no inconvenience to the public, sustained in *Prospect, etc., v. Brooklyn*, 32 N. Y. Supp. 857.

But where a gas company has received no public benefit it may mortgage its property the same as any private corporation can. Cases reviewed, *Hunt v. M. G. Co.* (Tenn.) 81 S. W. 1006.

## SECTION TWO.

**Central Transportation Company v. Pullman Palace Car Co.**, 130 U. S. 24; 11 S. C. Rep. 478.

**Leasehold void:** *Thomas v. Railroad Co.* followed; but it is said recovery should be allowed for quantum meruit.

From the formidable authorities<sup>1</sup> cited with approval in this case, it can readily be seen that, if the question should come before it, the opinion of the court would be that although the plaintiff was not allowed to recover rent upon the void lease with the defendant, yet that it would be allowed to recover for *quantum meruit*.

<sup>1</sup> *Salt Lake City v. Hollister*, 118 U. S. 263; 6 S. C. Rep. 1059; *Hitchcock v. Galveston*, 96 U. S. 341, 350; *Louisiana v. Wood*, 102 Id. 294, 299; *Parkersburg v. Brown*, 106 Id. 487, 503; 1 S. C. Rep. 442; *Chapman v. Douglas Co.*, 107 U. S. 343, 355; 2 S. C. Rep. 62; *Pittsburgh v. K. & H. B. Co.*, 131 U. S. 371; 9 S. C. Rep. 776. *Contra:* See *Olcott v. I. & G. N. R. Co.* — Texas, —, 28 S. W. R. 728, reviewing above and still more recent authorities and reaching the conclusion that the lessor to an illegal railway lease will not receive the aid of the courts to obtain either a return of the property or compensation, according to its terms or *quantum meruit*; both parties are *in pari delicto* and guilty of a grave offense against the public. The court finds the lease not only void as beyond the charter powers, but also illegal as against the public policy of the State; the court will leave the parties where they have deliberately put them-



"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation by the law of its creation is incapable of making it, the courts, while refusing to maintain any action upon the unlawful con-

selves; will not aid the lessor to recover the road; there are decisions holding that the promised rents can not be recovered; there are other decisions holding that a party obtaining money on a promise of doing something not within its power to do, must return the benefit received; *Louisiana v. Wood*, 102 U. S. 294; *Hitchcock v. Galveston*, 96 U. S. 341; *Parkersburg v. Brown*, 106 U. S. 487; 1 S. C. R. 442; *Chapman v. Douglas County*, 107 U. S. 348; 2 S. C. R. 62; but in these the plaintiffs had not themselves violated the law in the act of paying the money or conveying the property. So, also, where the illegal consideration remains unexecuted; *Springs Co. v. Knowlton*, 103 U. S. 49; but no recovery can be had where the party paying has also violated the law (*Thomas v. City of Richmond*, 12 Wall. 349) in purchasing a bond, both the issuance and consideration of which had been prohibited. The situation remaining unchanged, the lessee not having repudiated the agreement, the court will not make restoration to the lessor. *St. Louis, etc., v. Terre Haute*, 145 U. S. 393; 12 S. C. R. 953. The unlawful contract is executed by the delivery of the road in the first instance. *Cone v. Russell*, 48 N. J. Eq. 208; 21 Atl. R. 847; *Story Eq. Jur.*, § 298; *Pom. Eq. Jur.*, 941. The court further distinguishes a number of cases cited as having involved the rights of passengers, shippers, or other innocent parties not concerned in the illegal transaction, and concludes that the lessor, as well as all its stockholders, who consented to or acquiesced in the transaction, have no

standing in court to demand back the road, and that the right remaining in the State to set aside such a transfer can not be invoked by the individuals for their own purpose, they having by their own acts lost the right to proceed in their own names. (Such is a brief outline of this remarkable opinion, from the breadth of which it would follow that the making of lease—power being wanting, perhaps, on a mere technicality—will result in the confiscation of the property, the lessor being barred from recovering either the road, the rent, or *quantum meruit*.)

On the other hand, see *Re Pendleton Hardware & Imp. Co.*, —Or. —; 83 Pac. Rep. 545. Hardware company not empowered to buy lime must return it or pay for it, and its assignee stands in the same position. *Magee v. Pacific Imp. Co.* —Cal. —; 83 Pac. Rep. 772. Company taking guests becomes liable as innkeeper though incorporated for other purposes.

Another phase of the Pullman Car Company contracts is presented in *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.*, 11 S. C. Rep. 490, in which the Supreme Court sustains the contract because, while it compels the railway company to receive all its cars from the Pullman company, yet the latter is not prohibited from supplying also other companies; hence, competition is not restricted; and, as it must supply all that the public needs to the former company, the public does not suffer. The Pullman Palace Car Company lease was again before the court (65 Fed. Rep. 158.) and the lessee was held liable for *quantum meruit*.

tract, have always striven to do justice between the parties; not, however, by sustaining an action on the contract, but on the implied contract of defendant to return; or failing to do that, to make compensation for property or money which it has no right to retain." To maintain such an action is not to affirm but to disaffirm the unlawful contract.<sup>1</sup>

### SECTION THREE.

**East Line, etc., v. Rushing, 6 S. W. 834; 69 Texas, 806.**

**Sale can be only to a company whose road is not parallel and not competing.**

The statutes of Texas allow a railroad company to sell its road to other companies not parallel or competing. The defendant, being sued for injuries to a person, pleaded that it had sold its road, by due authority of law, and was not operating it, and hence, not responsible for the injury; this plea was held bad on demurrer, because it failed to allege that the sale was to a road not parallel nor competing; the court say that possibly they could judicially know enough geography to perceive that the roads were not parallel, but they never could know without allegation and proof that they were not competing; roads may be competing, no matter how or where they run.

### SECTION FOUR.

**Langdon v. Branch, 37 Fed. Rep. 449.**

**Road can not be indirectly sold to a competing company.**

A company transferred nearly all of its stock, bonds and assets to a construction company as security for the building of its road by the latter company; the construction company did not commence the work, but transferred all these effects to another company, owner of a road, which would be a competitor to the new road, if built; and this latter company bought

<sup>1</sup> All acts outside of the object of when the company had no power to a company's creation are not merely make it, he should disaffirm and sue voidable, they are void; the injured for an accounting. *Miller v. A. M. party can not recover on the contract A. I. Co., 92 Tenn. 167, 21 S. W. R. 89.*



all the stock of the construction company; the whole scheme was declared illegal and void, as an attempt to evade the constitution, which prohibits the purchase by one road of the stock of another, and prohibits contracts between them tending to lessen competition and to create monopoly.

### SECTION FIVE.

**Macintosh v. Flint & P. M. R. Co., 84 Fed. Rep. 582.**

**One corporation can not be allowed to absorb another by purchasing its stock.**

The Flint & Pere Marquette Railroad Company was about to purchase the stock and franchises of the Port Huron & Northwestern Company. The common stockholders of the first named company objected thereto upon the grounds that such purchase is unauthorized under the laws of Michigan, and also that the surplus funds of the first company should be used as dividends for the complainants and not for the purpose stated. Injunction was granted, the court being of the opinion that it is well settled that the proposed purchase of the stock property and franchises of the latter company, whereby that company would be absorbed by the purchasing company, can not legally be made in the absence of lawful authority from the State of Michigan.<sup>1</sup> Under the general railroad law, companies are allowed to consolidate when they form continuous or connecting lines; this contemplates the formation of a new corporation, and requires the consent of the majority of the stockholders in each company. This statute, however, does not cover this case; this is not to be a consolidation, but a purchase of the latter company's stock, property and franchises, and to use the same as part and parcel of the purchasing company, and then to bring the acquisition within the operation of its own charter. The consolidation statute does not authorize one company thus to acquire and absorb another.<sup>2</sup> The other statutes are obviously not applicable, which allow

<sup>1</sup>Citing *Pearce v. R. R. Co.*, 21 *Railroad*, 118 U. S. 290 6 S. C. R. How. 442; *Thomas v. R. R. Co.*, 101 1094.

U. S. 71; *Branch v. Jesup*, 106. U. S. <sup>2</sup>Act 1873, § 29.  
478; S. C., 1 S. C. R. 495; *Railroad v.*

one company to subscribe to the capital stock of another, or to aid another having an unfinished road, and where their lines are connected, to enter into arrangements for their common benefit, "consistent with and calculated to promote the objects for which they were (respectively) created." Moreover, the complainants being entitled to stock in the first named company, should have an opportunity to be heard and to express their assent or dissent upon the contemplated purchase, for if it can be made it is still an enlargement and extension of the corporate purpose as defined in the charter. The proper time to do this is before,<sup>1</sup> and not after, the transaction is completed.

### SECTION SIX.

**Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 9 S. C. R. 409, 180 U. S. 1.**

**Unauthorized lease, not deemed an executed one by three years continuance.**

At common law the lease by one railroad company to another for ninety-six years, by which the lessor practically abdicates all its functions and public purposes, is void;<sup>2</sup> the Oregon statutes do not expressly, or by implication, authorize such lease to be made. The lessor company was organized under the acts of Parliament, and even if its articles of association give it the power to make such a lease yet it could not exercise such power in Oregon, for there it would have only such powers as are possessed by all such corporations under the Oregon statutes; and special powers under its articles are subject, of course, to the laws of the State and can not give a power which is beyond the powers conferred by law. No corporation could assume to itself powers of action by the mere declaration in its article or memorandum that it possessed them. Statutes

<sup>1</sup> *Black v. Canal Co.*, 24 N. J. Eq. 455. not without legislative consent absolve itself from its duty to the public

<sup>2</sup> A contract not within the scope of the powers of a corporation can not be made valid by the assent of every one of the stockholders. *Thomas v. Railroad Company*, 101 U. S. 71; *Iron Co. v. Riche*, L. R. 7 H. L. 653; *Railway Co. v. Railway Co.*, 11 C. B. 775; *Railroad Co. v. Winans*, 17 How. 30. A railroad company can lic by turning over its property to another; authorities last above, also *Beman v. Rufford*, 1 Sim. N. S. 550; *Winch v. Railway Co.*, 13 Eng. L. & Eq. 506; *Railroad Co. v. Steamboat Co.*, 107 U. S. 98, 2 S. C. R. 221; *Railroad Co. v. Railroad Co.*, 118 U. S. 290; 6 S. C. R. 1094.

granting powers are to be strictly construed.<sup>1</sup> Much more then should this rule be applied when the extent of power is laid down in *ex parte* articles of association.

It would be a forced argument which would vest in railroad companies the general power to sell or lease their property or franchises, or to make contracts to buy or take leases of the same from other railroad corporations, from the indefinite terms "successors or assigns" incidentally, perhaps loosely, used in the statute.

The contract is not so far an executed one as to estop defendant from denying its validity. It has run three years, during which defendant has paid the rent accruing to plaintiff; it is carrying the doctrine too far to say that the lease thus becomes an executed contract, and invalid and unauthorized though it be, it binds the defendant for ninety-three years to come. This has been fully discussed in *Thomas v. Railroad Company* and *Railroad Company v. Railroad Company* already cited. Judgment for plaintiff for amount of rent due, reversed.<sup>2</sup>

FIELD, J., dissenting, finds from the use of the word "assigns" in the statute the implied permission for making leases, and that the policy of the State should be considered as favoring, rather than not, the transfer of a road from a foreign to a domestic corporation.<sup>3</sup>

<sup>1</sup> *Thomas v. Railway Co.*, 101 U. S. 71; *Charles River Bridge Co. v. Warren Bridge*, 11 Pet. 420; *Railroad Co. v. Litchfield*, 23 How. 66; *Turnpike Co. v. Illinois*, 96 U. S. 63. charges, including dividends on preferred stock, although thereby the possibility of any dividend being paid on the common stock is excluded during said ninety-nine years. *Middleton v. Boston, etc., R. Co.*, 53 Conn. 351.

<sup>2</sup> Followed in a later case between same parties involving another installment of rent under same lease. 12 Supreme Court Reporter, 814. Exhaustive briefs and opinions and construction of contracts of consolidation and of rights of preferred and guaranteed stocks, may be found in *Boardman v. Lake Shore, etc., Ry. Co.*, 84 N. Y. 157.

<sup>3</sup> When leasing is authorized by the charter it may be for ninety-nine years and at a rent not exceeding the amount needed to pay fixed

## SECTION SEVEN.

**St. Louis A. & T. H. R. Co. v. Indianapolis & St. L. Ry. Co. et al., 6 S. C. R. 1094, 118 U. S. 290. Petition for rehearing overruled, 7 S. C. R. 24, 118 U. S. 630.**

**Power to make leases denied. Dissenting opinion by Bradley and Harlan, JJ.**

Bill by the St. Louis, Alton & Terre Haute Railroad Co. to collect rent from the Indianapolis & St. Louis Railroad Company and for an accounting upon a ninety-nine years lease, upon that portion of the lessor's road which lies in Indiana; also to hold responsible thereon certain other companies as guarantors. The decree below in complainant's favor is reversed.

Lessor had no power unless specially authorized by its charter or other legislative act to turn over by lease or otherwise for a long period of time, to another company, its road and all its appurtenances, the use of its franchises and the exercise of its powers; nor can any other company without similar authority receive such property for such purposes. The power to make such contracts is not among the ordinary powers of railroad companies, and is not to be presumed from the usual grant of powers in a railroad charter.<sup>1</sup>

The legislative act in Illinois referred to confers the alleged power upon the lessor, but those of Indiana do not confer such power upon the lessee, to become party to the lease in question; nor is there any power shown in the other companies defendants to execute the guaranty.

The Illinois act<sup>2</sup> gives railroad companies power "to make such contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads or any part thereof." This gave the complainant power to be lessor, but such power is futile<sup>3</sup> where there is no capacity in the lessee to accept the lease. The Indiana statutes,

<sup>1</sup> Thomas v. Railroad Co., 101 U. S. 85; Riche, L. R., 7 H. L. 658; S. 71; Green Bay & M. R. Co. v. MacGregor v. Dover & D. Ry., 18 Q. Union Steam Boat Co., 107 U. S. 98; B. 618; East Anglian Rys. v. Eastern S. C., 2 S. C. R. 221; Davis v. Old Co's Ry., 11 C. B. 775.

Colony R. Co., 131 Mass. 258; Pearce v. Railroad Co., 21 How. 441; York & Maryland L. R. Co. v. Winans, 17 How. 30; Eastern Co's v. Hawkes, 5 H. L. Cases 831, 871, 881; Ashbury

<sup>2</sup> Section 1, February 12, 1855.

<sup>3</sup> Thomas v. Railroad, 101 U. S. 85; lessees were natural persons having power to contract, but lessor had no power and hence lease held void.

under which it is created and exists, confer no such power. It is not contained in an act<sup>1</sup> which provides that if any railroad shall be in the hands of a lessee that the lessee shall pay all taxes and assessments thereon. Nor in an act<sup>2</sup> which allows railroad companies meeting others at the boundary line to make contracts with them for transportation of freight and passengers, *or for the use of its said road*. This means only forwarding contracts or possibly the use of the road for the cars of the other company to run to their destination without breaking bulk. The Supreme Court of Indiana has held<sup>3</sup> that the laws allowing consolidation of roads do not include the terms lease or sale, and that to allow roads to "connect" would seem to exclude the idea of leasing or selling.

The lease in question has indeed been held obligatory upon this same defendant, Indianapolis & St. Louis Railroad Co.,<sup>4</sup> but that suit was brought in Illinois to collect Illinois revenue; and for the purposes thereof the defendant was held to be an Illinois corporation and taxable upon its capital stock, inasmuch as by an act<sup>5</sup> of the Illinois legislature it was made an Illinois corporation, and was using part of the present plaintiff's road in Illinois. But the lease, as now in question, was made two years prior to said act, at a time when defendant was only an Indiana corporation, with no powers under Indiana law to accept a lease, and no act of the Indiana legislature has ratified it since. The present suit is against the defendant as an Indiana corporation, otherwise it could not be maintained in the Federal Court. The acts referred to have not made it an Illinois corporation so as to give it citizenship there.<sup>6</sup>

As to the contract of the guaranteeing companies, it is, of course, void if their principals' contract is void, and it is so held. Moreover, no power is shown in them to lease roads beyond their own States; there is not even the just claim for authority that they are connecting roads with the lessor, as is the lessee. The connection even by traffic is remote. These companies might as well have assumed to loan them money

<sup>1</sup> December 8, 1865, section 8.

<sup>4</sup> Railroad v. Vance, 96 U. S. 450.

<sup>2</sup> Section 3, February 23, 1853; Rev. St. Ind. 1881, section 3973.

<sup>5</sup> March 11, 1869.

<sup>3</sup> Board of Comm'rs, etc., v. Railroad Co., 50 Ind. 110.

<sup>6</sup> Same point has been ruled in Railroad Co. v. Whitton, 13 Wall. 270; Muller v. Dows, 94 U. S. 444.

or indorse their notes, or any other commercial transaction, as to guarantee the performance of a void contract by one company to another.<sup>1</sup> The fact that the contract has run ten years is no reason why defendants should be estopped from repudiating it; quite the contrary; the longer it runs the more imperative becomes the duty of the directors to end it.

“Railway investment shall not be considered a wild speculation, exposing those engaged in it to all sorts of risk, whether they intended it or not. \* \* \* The funds should not be pledged in support of speculations not authorized by their legal powers, and which might very possibly, to say the least, lead to extraordinary loss on the part of the railway company.”<sup>2</sup>

Where the recalcitrant party has received money or other valuable property it is in an appropriate case estopped from pleading *ultra vires*, but here so far as the guarantors are concerned, they have never received anything, on the contrary have been paying money under this contract which they had no power to make, and the plaintiff has been receiving it; and so far as the principal defendant, the alleged lessee is concerned, it has not appealed from the decree; it admits of doubt whether it would be liable on a *quantum meruit*, and need not be decided. The bill should be dismissed as to the guaranteeing companies.<sup>3</sup>

BRADLEY, J., *dissents* in an opinion of about a page, the logic and vigor of which are in inverse ratio to its brevity. Mr. Justice HARLAN agrees with him. Attention is called to the fact that the great area of the United States, subdivided into many independent states, makes the English decisions inap-

<sup>1</sup> Colman v. Eastern Co's Ry. Co., 10 Beav. 1; Madison, W. & M. Plank Road Co. v. Watertown and Plank Road Co., 7 Wis. 59; Pearce v. Madison & Indianapolis Ry. Co., 21 How. 441.

<sup>2</sup> Colman v. Eastern Co's Ry. Co., 10 Beav. 1.

<sup>3</sup> Read in this connection, Rabe v. Dunlap (N. J.), 25 Atl. 959. Consolidation of hotel company and diverting its property from purposes embraced in its incorporation *ultra vires*, but plaintiff having waited three years, in meantime money expended and mortgage made, is barred from relief. He should ask with sufficient promptness to enable court to do justice to him without doing injustice to others. Citing Kent v. Mining Co., 78 N. Y. 159; Sheldon v. Eickemeyer, 90 N. Y. 607; Watts' Appeal, 78 Pa. St. 370; Kitchen v. R. Co., 69 Mo. 224; Taylor v. R. R. Co., 4 Woods, 575; 13 Fed. 152; Graham v. R. R. Co., 2 Mach. & G. 146.

plicable, because there any one road can obtain power to traverse the entire country. It is carrying *ultra vires* to an absurd extent to hold that under our circumstances the power of railroads are so narrow as not to allow them to make business arrangements beyond their own tracks. This would forbid a New York company having an agent in St. Louis to solicit freight, and would not allow it to pay his office rent; would forbid five or six roads from operating as one continuous trunk line, and guaranteeing rent for a ferry boat which would form a connecting link between them, and receives such guarantee in consideration of extra accommodations afforded for the business of the line. "The guaranty is *ultra vires* and void. Is this law? It may be English law, but is it American law? I can not believe it." It is settled law that railroad companies may enter into contracts for the transportation of their freights hundreds of miles beyond their own tracks, yet according to doctrine of the opinion in this case, this would be *ultra vires*. Moreover the contract has been performed; the lessee and its guarantor have enjoyed the benefit of it. "With what face can they now refuse to pay what they agreed to pay? With what face can they plead incapacity to contract?" They are estopped; it is a plea made by them and not their stockholders. Mortgages made to national banks, though in violation of the act of Congress, have been enforced, leaving it to the government to call the banks to account for having acted outside of their chartered powers.<sup>1</sup> The same rule should be applied here.

<sup>1</sup> The doctrine of *ultra vires* is Board, etc., 83 Pac. Rep. 312 (Kans.); more strictly applied at the instance citing C. K. & W. R. v. Board, 86 of the state than at that of an individual. Kan. 128; 12 Pac. Rep. 593; Re Short, ual. Tod v. K. U. L. Co., 57 Fed. 47 Kan. 250. 27 Pac. Rep. 1005 and Rep. 53, 56; C. R. I. & P. Ry. Co. v. cases cited; Bell v. R. R. Co. (N. J. U. P. Ry. Co., 47 Fed. Rep. 22. The Ch.), 10 Atl. Rep. 741; Terhune v. inquiry as to validity of an existing Potts, 47 N. J. L. 218; Rice v. Bank, consolidation can be made only by 126 Mass. 303. the state. A. T. & S. F. R. Co. v.



## SECTION EIGHT.

**Memphis Grain & Elevator Co. v. Memphis & Charleston R. R. Co., 5  
South Western Rep. 52; — Tenn. —**

**Railroad company can not guarantee a profit to an elevator company.**

The Memphis & Charleston Railroad Company has power under its charter to do all lawful acts proper to its business, and such additional powers as may be convenient for the due and successful execution of the powers granted in the charter. This gives it the right to employ all appliances necessary to the promotion of the legitimate objects and purposes of the corporation. It may as properly build or rent elevators for the purpose of loading or unloading as it may hire labor, build or rent trucks, wagons, etc. But this does not give the corporation the power to guarantee a profit to an elevator company; that is not the hiring of labor or machinery for railroad purposes. (It was made as an inducement to get subscription to the stock.) There may be an implication of an agreement to employ the elevator company to do necessary work for the railroad, but it goes beyond. There is nothing in the obligation which expressly binds the corporation to use the elevator, nor is it important to its owners whether it does use it. The corporation is only concerned in its own success, and authorized only to do such things as are necessary to the transaction of its business, the business for which it was incorporated. In no part of the grant of power is that of guaranteeing the success of another institution, person or corporation to be found in either expression or implication. Every person contracting with a corporation is bound to take notice of the legal limits of its capacity. It has only such powers as its charter confers. If it exceeds these, the government may take its charter, the subscribers to its stock may by injunction restrain it from carrying out a contract manifestly beyond its powers, and a court of law will sustain no action thereon against the corporation.<sup>1</sup> Decision of the court below refusing to enforce by bill in equity the contract of guaranty is affirmed.

<sup>1</sup> *Davis v. Railroad Co.*, 131 Mass. 259.



## SECTION NINE.

**Middlesex Railroad Company v. Boston & Chelsea Railroad Company,**  
115 Mass. 847.

**Illegal transfer of franchise by a horse railroad company.**

Defendant, a horse railroad company, transferred the entire contract of its road and franchises to another company, which assigned its rights to the plaintiff. The transferee was to pay a fixed rent, in the form of dividends, to defendant's stockholders, and defendant was to pay one-half of the expenditures incurred for repairs.

The entire agreement is held void,<sup>1</sup> and the amount expended for repairs, being attributable entirely to the contract, is held not recoverable.

## SECTION TEN.

**Black et al. v. The Delaware and Raritan Canal Co. et al.,** 24 New Jersey Equity 455, reversing same case in 22 New Jersey Equity 182.

**Unauthorized lease; rights and status of the minority shareholders.**

Bill to restrain execution of a lease by the United Companies of New Jersey to the Pennsylvania Railroad Company.

Opinion of the court by VAN SYCKEL, J., with whom six concur. (BEASLEY, C. J., dissenting.)

Corporate franchises, powers and property shall not be appropriated to uses or purposes not contemplated or authorized by their charters.<sup>2</sup>

No majority, however large, has the right to divert one cent of the joint capital in a manner not consistent with and growing out of the original fundamental joint intention.<sup>3</sup>

A lease for 999 years deprives the shareholder of all gains in the property and substitutes without his concurrence simply a share in a fixed rent, having only the right to re-enter, which can scarcely be called a security; the lease is practically per-

<sup>1</sup> Richardson v. Sibley, 11 Allen, 65. Co., 10 Beavan 1; Salomons v. Laing,

<sup>2</sup> 1 Stockton, 407.

6 Railw. Cases 289; 1 Dr. & S. M.,

<sup>3</sup> Clearwater v. Meredith, 1 Wal- 794; Zabriskie v. The Hack. & N. J. lace 40; Coleman v. East Conn. R. R. Co., 8 C. E. Green 183

petual and during its term all the tangible assets will be dissipated and decayed.<sup>1</sup> -

True it is that a corporation may abandon its business, but in such case the franchises could not be transferred; they would revert to the sovereignty; shareholders would be entitled to their distributive shares in the assets and could not be compelled to accept a lease for 999 years.

Moreover, a domestic corporation can not convey its franchises to a foreign corporation so as to enable the latter "to accept and exercise such franchises within our territorial limits, without the assent of our legislature."<sup>2</sup>

The proposed lease will work a radical change in the purposes for which the defendant corporations were organized; the legislature can not empower the corporations to alter fundamentally the character of their enterprise, unless by unanimous consent of the shareholders. No shareholder's contract can be changed without his consent.<sup>3</sup>

Nevertheless, the minority of shareholders should not be allowed to arrest great public improvements nor to impede the establishment of through lines of railroad, as required by interstate commerce and public convenience.

The act of the legislature raises the presumption that the use is a public one,<sup>4</sup> and under the principle of eminent domain the taking may be of any property, real or personal, franchises, or corporate shares.

Sufficient compensation is provided under the act of March 17, 1870, for the unwilling stockholder; he is to receive its full value, to be appraised by commissioners appointed by a com-

<sup>1</sup> Compare *C. & A. R. R. Co. v. 46*; and citations in this case in 7 C. People (Ill.), 38 N. E. R. 1075; lease in E. Green.

perpetuity by Bridge Company to Rail Road Company, but reserving right of re-entry in case of default; title remains in Bridge Company, though otherwise, when no such right reserved.

<sup>2</sup> *The Bank of Augusta v. Earle*, 18 Peters 519, 588.

<sup>3</sup> *Zabriskie v. The H. & N. Y. R. Co.*, 3 C. E. Green 183; *Lauman v. The Lebanon V. R. R. Co.*, 6 Casey

<sup>4</sup> *The Tidewater Co. v. Coster*, 3 C. E. Green 521; *White River Turnpike v. Vermont Central R. R.*, 1 Am. R. Cases 237; *Enfield Bridge Co. v. H. & N. H. R. R. Co.*, 2 Am. R. C. 105; *West River Bridge v. Dix*, 6 How. 529; *Richmond R. Co. v. L. R. Co.*, 13 How. 78; *Redfield on Railways*, "Condemnation of Franchises;" *Central Bridge Co. v. City of Lowell*, 4 Gray 481.

petent court; and payment can be enforced before the property is delivered.

The act of 1870 does not authorize the lease to be made to a corporation of another State. The text of the statute reviewed, and held that it does not clearly and expressly grant the power; neither is the lessee company shown to form a continuous or connected line with the lessor.

The meaning of this statute is doubtful, and a doubt must be solved against the existence of the alleged power.<sup>1</sup> A grant from the State "will not be deduced from the words of a statute except when it contains language not susceptible of any other rational construction."<sup>2</sup> As to a comparatively unimportant matter not materially affecting other parties, the rule might be relaxed with less serious consequences.

The case must be decided on the record as made below; other facts or legislation since intervening can not be considered. The decree is reversed and case remitted with order that the injunction do issue; if new equities have arisen or new legislation been had, their effect must be passed upon by the chancellor before being considered here.

Concurring opinion by DALRIMPLE, J.

Concurs in the majority opinion, except as to the act of 1870, which he holds unconstitutional because failing to provide for compensation.

Dissenting opinion by BEASLEY, C. J. During the long delay in the case, the lease has, in fact, been executed and the property delivered; these facts should be considered by this court; or, if not considered, it must be said that this court is not sufficiently informed, and in either event the extraordinary remedy of injunction should not be applied.<sup>3</sup> Neither should there be given any opinion on the merits of the controversy; there was an objection made below to the non-joinder of the lessee company as defendants; the objection was well taken

<sup>1</sup> Townsend v. Brown, 4 Zab. 87; 1 C. E. Green, 372, 9 Harris 22.

<sup>2</sup> Stevens v. Patterson R. N. Co., 5 Vroom 537.

<sup>3</sup> Similar instances: Trustees v. Nicoll, 8 Johns. R. 587; Att'y Gen'l v. City, 1 Stockt. 627.

(But see Nathan v. Tompkins, 82 Ala. 488, holding that an injunction should be reinstated, it having been dissolved upon coming in of an answer alleging abandonment of the purpose of making the illegal consolidation.)

and no decision can be made on the merits in the absence of a necessary party.

Same Case: in 22 N. J. Eq. 132.

This case of *Black v. Delaware & Raritan Canal Co.* was so thoroughly discussed on the hearing before the chancellor, 22 N. J. Eq. 132, and the opinion is so comprehensive that an outline must prove interesting and instructive. Indeed, many of the propositions there elaborated seem to be sustained on the final hearing (24 N. J. Eq., 455, *supra*), although the decision is reversed :

Application for preliminary injunction, brought by stockholders, against the Delaware & Raritan Canal Company and two railroad companies, to restrain them from executing a lease of their works to the Pennsylvania Railroad Company for 999 years. Denied.

Zabriskie, chancellor: Complainants own 3,455 shares of \$100 each, out of a total of defendant's aggregate capital, \$18,990,400. The defendants were legally consolidated and are commonly known as the United Companies of New Jersey. The act approved March 17, 1870, is relied on as giving power to make the lease in question. "That it shall be lawful for the United Companies, by and with the consent of two-thirds of the stockholders of each to consolidate their respective capital stocks; or to consolidate with any other railroad or canal company or companies, in this State or otherwise, with which they are or may be identified in interest, or whose works shall form, with their own, connected or continuous lines; or to make such other arrangements for connection or consolidation of business with any such company or companies by agreement, contract, lease or otherwise, as to the directors of said United Companies shall seem expedient."

It provides that any dissenting stockholder shall be paid the full value of his stock, to be appraised by commissioners appointed for the purpose.

A corporation can not lease or alien any franchise or any property necessary to perform its obligations and duties to the State without legislative authority.<sup>1</sup>

<sup>1</sup> *Beman v. Rufford*, 1 Sim. N. S. W. R. Co., 6 H. L. Cas. 131; *South*, 550; *Johnson v. Shrewsbury*, 3 De etc., Co. v. G. N. R. Co., 3 De G., G., Mac. & G. 914; *Shrewsbury v. N. Mac. & G.* 576; *Waich v. Birben-*

The statute allows consolidation with companies in this State "or otherwise;" this means companies of other States.

Grants from the State are to be strictly construed, but yet reasonably, and so as not to defeat the legislative intent; ambiguity to defeat them must be such as can not be removed by the settled rules of construction.<sup>1</sup> "This act can hardly be considered a grant from the State, or to fall within the reason of the rule requiring strict construction in all such grants. The State here parts with no property, and creates no new privilege or franchise that can affect the public. It simply permits a new arrangement or contract as to privileges and franchises already granted. It enlarges none."

The Pennsylvania Company's lines are both continuous and connected with the works of the defendants.<sup>2</sup> Railroads may be connected either directly or by intervening roads. The use of the word "connected" after "continuous" is for the obvious purpose of extending the provision and shows the intent is to include roads connected by some intervening or connecting road.

The lease, though for 999 years, is not equivalent to a sale; the term is, no doubt, practically equivalent to a fee, but differs radically from a sale because it is for rent reserved during a term with power of re-entry. This is merely a lease both in substance and form and authorized by the terms of said statute.

Complainants insist that the objects expressed in defendant's charter can not be diverged from without their consent. Where the charter stipulates how long the business is to be continued it can not be sooner abandoned except by consent

head, 5 De G. & Sm. 562; G. N. R. boken L. & I. Co., 2 Beas. 81; Del. & v. Eastern, 9 Hare 806; Troy, etc., v. Rar. Canal Co. v. Rar. & Del. Bay R. Kerr, 17 Barb. 601; Ohio, etc., v. Co., 1 C. E. Green 372; Richmond Indiana, etc., 14 Am. Law Reg. 733; R. Co. v. Louisa. R. Co., 18 How. 81; Lauman v. Lebanon, 6 Casey 42; Perrine v. Ches. & Del. R. Co., 9 York v. Winans, 17 How. 89; Commonwealth v. Smith, 10 Allen 455; 182; Rice v. Railroad Co., 1 Black Richardson v. Sibley, 11 Allen 66. 380; Phila. & Erie R. Co. v. Cata-

<sup>1</sup> Sedg. on Stat., 259 and 327; State wissa R. Co., 53 Penn. 20.  
v. Newark, 4 Dutcher 529; Wright v. <sup>2</sup> Briggs' Case, 2 Zab. 623; The Del-Carter, 8 Dutcher 76; Briggs' Case, aware, etc. Co. v. Raritan, etc. Co., 3 Zab. 644; Bridge Proprietors v. Ho- 1 C. E. Green 321; 3 C. E. Green, 546.

of all.<sup>1</sup> But there is no case that holds that a majority of the corporation, where a time is not specified for which the enterprise must be continued, may not abandon the enterprise and sell out the property of the company.<sup>2</sup> A partnership upon no specified time, is at will only, and may be ended by any partner at his will,<sup>3</sup> and a corporation being for no specified time, is not a contract to continue it forever; it is unreasonable and unjust to permit one to compel all the others to continue a business which they find unprofitable and undesirable. A lease for 999 years may be made without the consent of all the stockholders if authorized by the legislature,<sup>4</sup> and a consolidation may be made on consent of two-thirds, if authorized by the legislature.<sup>5</sup> A private corporation may abandon its business; the doubt expressed<sup>6</sup> whether a corporation for *quasi* public purpose may do so would not apply to a case where the State has authorized it. Such a radical change must be made by the corporation and not by the directors. If no provision to the contrary, the rule is that the majority governs.<sup>7</sup> The directors being authorized to conduct the entire management can do so by obtaining a certain and fixed return each year, in place of the profits of operating the road themselves; no court has decided that they do not have such power if exercised with the consent of the majority of the stockholders; but the majority can not compel the minority to embark with them in the new enterprise; provision is therefore made to pay them the full value of their shares; and this is all they would have, were the business abandoned and the works sold out, as it might be under a charter which specifies no time. The provision is a most equitable one and without it the transaction, even if valid and legal, would not be equitable and just.

<sup>1</sup> *Zabriskie v. Hack. and N. Y. R.* on Part., Lib. 17, Tit. 2, N. 64; 1 Do-  
Co., 3 C. E. Green 178, and authorities there cited. *mat's Civil Law*, §§ 802, 803.

<sup>2</sup> *Kean v. Johnston*, 1 Stockt. 413, is a dictum only; *Natusch v. Irving* therein cited; *Livingston v. Lynch*, 4 Johns. Ch. 573 and *Binney's Case*, 2 Bland's Ch. 142, do not support the position.

<sup>3</sup> Story on Part., §§ 269, 270; Coll. on Part. (2d ed.), B. 2, Ch. 2, § 2; Pothier

<sup>4</sup> *Gratz v. Penn. R. Co. et al.*, 5 Wright 447.

<sup>5</sup> *Commonwealth v. Atlantic & G. W. R. Co.*, 3 P. F. Smith (53 Penn. R.) 9.

<sup>6</sup> *Treadwell v. Salisbury Manfg. Co.*, 7 Gray 393.

<sup>7</sup> Grant on Corp. 68; A. and A. § 499.

The act of the legislature determines that the consolidating of these railroads is for a public use and a proper occasion for the exercise of the power of eminent domain; it is to bring about one continuous line through New Jersey and forming its portion in a line from the Pacific to the Atlantic. Any property of the defendants can be taken under this power of eminent domain and any interest of the stockholders, the same as though they were owners of undivided interests in realty, provided only that compensation be first made.<sup>1</sup>

It is questionable whether the contemplated lease is such a taking as the constitution contemplates. Complainants are not in possession of the road; but the corporation is, and it will give up the road; and if this is a wrong act, the complainants have their remedy in equity to compel the lessee to surrender the lease; but if complainants' stock is taken and paid for under proceedings in condemnation, as prescribed by the act (the value being fixed by commissioners), then they have no other redress.

Here are unsettled questions of constitutional law; injunctions should not be granted on a doubtful right, especially where, as here, only one sixtieth of the stockholders complain, and great and irreparable injury would result in arresting these important negotiations. Preliminary injunction was unanimously refused in a similar case in which the constitution was alleged to have been violated, and the stockholders' rights were held for determination on final hearing.<sup>2</sup>

Complainants' acquiescence in prior similar exercises of power by the directors and by the legislature forms another good reason why they should not obtain a preliminary injunction against the present one.

The question as to the lessee company's power to enter into the lease is very material; if it has no such power it would be gross waste and mismanagement to turn the property over to it; but the courts of Pennsylvania have construed their laws<sup>3</sup>

<sup>1</sup> Constitution, Art. IV, section 7, 1871; *The Phila., etc., v. The Catawissa R. Co.*, 53 Penn. R. 20, and ¶ 9.

<sup>2</sup> *Mott v. Penn. R. Co.*, 6 Casey, 23. many other decisions.

<sup>3</sup> Act of Pa., Feb. 17, 1870, May 8,



as giving the lessee power to accept a lease, and other courts should adopt their construction.<sup>1</sup>

### SECTION ELEVEN.

**The Board of Commissioners of Tippecanoe Co. et al. v. The Lafayette, Muncie & Bloomington Railroad Co. et al., 50 Indiana 85.**

**Perpetual lease held ultra vires, at the suit of stockholders of the lessor company.**

Defendant transferred and conveyed to another corporation the exclusive right to transport freight and passengers over that portion of defendant's road in Indiana for ninety-nine years, renewable at the pleasure of the latter company. The contracts were executed by the directors without consent of the stockholders; the lessee assigned its interests to another corporation.

A corporation has no power except such as is expressly granted or necessarily implied; a railroad company is a *quasi* public corporation; it has powers which are denied to individuals and even to other corporations, *i. e.*, eminent domain and the assistance of the power of taxation; hence, it owes reciprocal duties to the public. The true construction of the agreements in question is really a sale, although they are called leases; it differs only in being payable in semi-annual installments instead of a sum total.

It is not authorized by the statute which allows consolidation;<sup>2</sup> it does not mention sale or lease; nor the one which provides for judicial sales,<sup>3</sup> nor by sundry other statutes which fix certain liabilities upon lessors and lessees, as to killing:

<sup>1</sup> Amer. Print Works v. Lawrence, 8 Zab. 590.

Foregoing is submitted as a substantial statement of this oft cited case, covering, with statement of facts and briefs of counsel, three hundred pages of the report. The briefs are especially commendable as exhaustive and able treatises, with abundant citations upon the many important questions involved.

A later instance of want of power of one party vitiating entire contract:

A traffic arrangement between parallel lines is held illegal, although some are interstate lines; being illegal as to the lines wholly within the State, and therefore illegal as to some of the contracting parties, it must be void as to all. Gulf C. & S. F. Ry. Co. v. State, 10 S. W. 81; 72 Texas 404.

<sup>2</sup> Feb. 23, 1853, 1 G. & H. 526.

<sup>3</sup> March 3, 1865, 8 Ind. Stt. 395;

Dec. 20, 1865, 8 Ind. Stt. 401.



stock, etc.; a right or power can not be derived from a statute which simply creates a liability or enforces an obligation.

The remedy of *quo warranto*, if existing, would be concurrent with the remedy of the stockholders; neither would the latter be lost by their delay and acquiescence and receiving benefits thereunder. "A contract *ultra vires* the charter is void and can not be made valid by any subsequent act of the corporation, because there is no residuary power to confirm it. What they could not make they can not confirm. A void act can never become valid merely because it remains unquestioned."

The power of the directors is limited to the purposes of the corporation; they can make no considerable change in the road, "as severing its trunk, changing its termini, leasing or selling a portion of its track" without the stockholders' consent. A corporation may be bound in cases where the stockholders are not bound unless they acquiesce; "but if the act is *ultra vires* the corporation, it is void and no one is bound."

The contract is in contravention of public policy and hence void; the funds raised by taxation and subscription are diverted from their purposes; the continuous lines contemplated are disturbed, and made local, or else otherwise arranged.

The term is for ninety-nine years with power of renewal, and hence is perpetual.

We do not decide that railroad companies can not become lessors or lessees of, or make contracts with, other railroad companies for purposes of running their lines in conjunction or otherwise facilitating commerce, but all such contracts must come "within the powers of the corporation, must not exceed the powers of the agency which makes them, must not violate the rights of stockholders or contravene public policy."

As a rule the *cestui que trust* can not bring suit in his own name until demand upon and refusal of the trustee to sue, "yet where it is known that the party either can not or will not comply with the demand if made, the other party is excused from making the demand."<sup>1</sup> The demand on the directors would have been unavailing as they could not have acted without the concurrence of the directors of the other compa-

<sup>1</sup> *Wilstach v. Hawkins*, 14 Ind. 541; *Law v. Henry*, 39 Ind. 414.

nies involved, which latter directors owed complainants no duty.

**ON REHEARING:** Our conclusion is not opposed to former decisions<sup>1</sup> in which the corporation's pleas of want of power were held bad. They sought to defeat the corporation's liability upon an acceptance of a bill of exchange in the former case, and in the latter case upon a subscription to a State Fair Association, after benefits had been received and enjoyed by the corporations. "In this class of cases the courts will go as far as is consistent with the fixed rules of law to reach the justice, equity and good conscience of the case." There is a wide difference between such cases and those in which the want of power is pleaded against the corporation to prevent the perpetration of an alleged wrong. "In such cases the courts will hold the corporations to the strictest rules of law." In these cases the right is found in opposite directions. "In one the decisions protect right, in the other they prevent wrong, and thus they are made consistent. In both they are based on the fundamental principle in jurisprudence that no one shall take advantage of his own wrong."

**WORDEN, J.**, dissents and thinks a rehearing should be granted.<sup>2</sup>

## SECTION TWELVE.

**Stewart's Appeal, 56 Pa. St. 418.**

### **Colorable transfer of franchise to an individual.**

A corporation having authority to build its road, but lacking funds with which to do so, made a contract with an individual whereby he built the road. The court finds that the proceedings were colorable, and to enable him to do so entirely for his own purpose, to reach his mines; and holds that the corporation stands in the place of the commonwealth and it has no power to alienate their authority and control to an individual, and that he becomes a trespasser in attempting to build the road.

<sup>1</sup> *Smead v. I. P. & C. R. R. Co.*, 11 is well worth perusal; it abounds in Ind. 104; *The State Board, etc., v. citations and illustrations, and re- The C. S. R. Co.*, 47 Ind. 407. states the contents of exhaustive

<sup>2</sup> The complete report of this cause briefs of which the court well says:

## SECTION THIRTEEN.

**East Line & Red River Railway Co. v. The State of Texas, 75 Texas 484.**

**Quo warranto sustained, forfeiting respondent's charter because of illegal sale.**

Respondent sold all its property and franchises, excepting only the franchise of being a corporation; this it could not do; it is not embraced in the charter power, "to join stocks or consolidate with any other railway company running in the same general direction;"<sup>1</sup> that clause would embrace only such another road "which might constitute a part of the line of railway respondent was empowered to construct, own and operate."

The prohibition to "rent, sell, lease or consolidate with any parallel or competing" line does not confer a power to sell to another railway company owning a road not parallel or competing.

The power to rent from, sell or lease to, or consolidate with another railway company does not exist in the absence of legislation permitting these things to be done, and it can not be implied from a prohibition extending to parallel or competing roads.

Lines may, by reason of relation with management or control, become competing lines although they do not in fact connect.

Corporations authorized to consolidate with a connecting road, can not consolidate with one whose road did not connect with that which that corporation, under the power conferred upon it, had constructed or purchased. To hold otherwise would allow a corporation to extend its connections to every road in the State.

"It is due to the counsel on both sides to say that they have supported their propositions with marked industry and ability."

<sup>1</sup> Act of March 22, 1871.

## SECTION FOURTEEN.

**The Peoria & Rock Island Railway Co. v. The Coal Valley Mining Co.,**  
68 Ill. 489.

**One company can not bind another not to carry coal.**

Bill by the Coal Valley Mining Company to restrain the Peoria & Rock Island Railway Company from transporting coal over their road except on payment of fifty cents per ton from Coal Valley to city of Rock Island.

The vast debts created by the public in aid of railroads and the extensive privileges, *e. g.*, eminent domain, given to railroad companies demonstrate that the legislature had the public interest primarily in mind, and the interest of the stockholders need be considered as only of incidental importance.

The roads as common carriers serve a public purpose; coal is an article suitable and proper to be carried for all who bring it, and must be carried on the same terms as other like freights similar in bulk and weight.

If defendant has bound itself not to perform such duty, such contract is *ultra vires*, so far as concerns the public.

Upon the consolidation of the original companies and the formation of the defendant, one of the original companies as one of the conditions thereof reserved the right to carry, with its own rolling stock, its own coal over the defendant's road, and the charge for the same should be applied upon the interest on the bonds which said company held against defendant. It was also agreed that defendant should not carry coal for any one else until after the annual interest charge had thus been paid; defendant also bound itself to pay the Coal Valley Company fifty cents per ton for all coal carried for any other party.

The court holds this agreement as contrary to public policy and not enforceable in equity. The fact that the Coal Valley Company did carry coal at reasonable rates for all who offered it, would make no difference; said company was under no duty to do so. The new consolidated company became liable to perform the duties of the original companies; no part of the franchise was reserved to either of the old companies, hence, they are not liable to the public for the performance of

duties devolving upon the new company, such duty must rest somewhere; the new company must be held liable for the performance of such duty, and no contract can absolve it therefrom, otherwise, all competition would be destroyed and the public left at the mercy of the Coal Valley Company.

### SECTION FIFTEEN.

**Currier v. Concord Railroad Company, 48 New Hampshire 321.**

**Competing roads enjoined at suit of citizens from consolidating.**

Bill for injunction by citizens of New Hampshire against the Concord Railroad and the Manchester & Lawrence Railroad to prevent their violating the act<sup>1</sup> against railroad monopolies. Demurrer to bill overruled.

The bill recites that they are rival and competing roads; each limited by its charter to a certain route, and subject to being bought by the State at a certain cost, and that it would be a violation of the charters if they should consolidate.

It recites, also, that the roads made a contract to continue twenty years by which they were to consolidate and were made equal sharers in the joint earnings of both in proportion to their capital stock, and the sole control and management of the Manchester & Lawrence Railroad placed in the hands of the Concord road; other stipulations of the contract are recited, among them the fixing of rates and the division of territory between the roads; and that these things had been done with the purpose and intent to evade the provisions and operations of said act.

The bill alleges that the companies contend that they have a legal right to equalize the earnings of the roads to prevent competition; that under pretense of complying with said act they have entered into an arrangement whereby the same persons are elected to jointly manage both roads; that they have a common interest in earnings and expenses.

The cause of the demurrer is that the plaintiffs are not alleged to have any right or interest in, or to be in any way concerned in, or aggrieved by any of the matters charged in the bill.

<sup>1</sup> Of July 5, 1867.

The act provides that the offenders shall be subject to a fine not exceeding five hundred dollars, for the use of the county within which the suit shall be instituted; and that it shall be lawful for any citizen to apply to the Supreme Judicial Court to issue an injunction to restrain such violation; the question is whether the citizen so applying must be shown to have a special interest in the subject beyond that which every citizen is supposed to have.<sup>1</sup>

The object of the law is to prevent the consolidation of rival and competing lines of railroad by contracts or arrangements between them, by means of which competition is removed; the purpose being to prevent the increase of the charges of such railroads beyond what might be expected under the influence of a free competition. In the promotion of this object, every citizen having occasion to use such roads, or to purchase articles transported over them, has an interest; but his interest is not of the character that may be protected by a suit for damages. It is much like the interest which every citizen has in a common highway—in its being kept in repair—and there, independent of statute provisions, he can maintain no action on account of any defect in its condition; and by statute he can maintain an action only in case he suffers special damages while in the use of the road; but not for being deprived of the use of it altogether by its being permitted to become impassable.<sup>2</sup> Upon the same principle, no person has such an interest in preserving a free competition between rival railroads as to be entitled to maintain a suit for diminishing or removing such competition; but the wrong which arises from the violation of the provisions of the statute is essentially a public wrong in which no citizen has a special or private interest.

Besides, the proceeding is not to recover damages for an injury already committed, but to restrain the violation of what is essentially a public right. It could never, therefore, have been the intention of the legislature to require that the citizen applying for an injunction should have a special pecuniary interest in enforcing the law. It is like a *qui tam* action, where the law calls on the citizens to aid in enforcing some public statute and gives them part of the penalty; in such case the

<sup>1</sup>There does not seem to be much room for question, the statute says any citizen. <sup>2</sup>Griffin v. Sanbornton, 44 N. H. 246.

persons instituting the proceedings are not supposed to have usually any special interest in the subject of the suit.

In most cases any citizen can bring a suit of this character, but the one who sues first is entitled to the penalty, and there can be but one recovery; and it is held that the first suit may be pleaded in bar of any subsequent suit.

In cases like the one now before us, as the object is to prevent the commission of a public offense and not to redress a private grievance, there could be no occasion for more than one injunction, and the court might properly decline to entertain a second application where there was already a subsisting injunction. The cases cited for the defendants hold that a private individual can not maintain suit for injuries caused by a public nuisance,<sup>1</sup> nor maintain a bill to enforce the construction of a railroad crossing, the statute having given that authority to the mayor and aldermen and selectmen and to no others.<sup>2</sup>

#### SECTION SIXTEEN.

**State v. Atchison & N. R. Co., 24 Neb. 143; 88 N. W. 43.**

**Illegal lease enjoined; not cause, in first instance, for forfeiture of franchise.**

A railway company leased its road for a long term to another company, together with all its rights, property and franchises. It is held, that it thereby abandoned the operation of its road and became subject to forfeiture upon *quo warranto*. The court says, however, that forfeiture will not be declared in the first instance, but the lease is to be declared void.

<sup>1</sup> Canal v. Newcomb, 7 Met. 276;   <sup>2</sup> Brainard v. Connecticut River R. Fall River Co. v. Old Colony Rail- R., 7 Cush. 506.  
road, 5 Allen, 224.

## CHAPTER III.

## COMBINATIONS, BETWEEN CORPORATIONS OTHER THAN RAILWAY, WHICH ARE REGARDED FAVORABLY.

Business corporations, owing no duty to the public, are not as restricted in their conduct as are railway and other similar corporations. Their powers extend to the selling of property, collection of debts, and the taking of all kinds of property, even stock of other corporations, for the payment of debts,<sup>1</sup> though, ordinarily, a corporation can not purchase or deal in stocks, unless expressly authorized by law so to do.

Exercising no power of a public nature, so long as they attempt no combination prejudicial to the public, their acts, whereby they dispose of all their property and retire from business, will be deemed valid, certainly when all the stockholders consent. And such disposition of property may be by way of sale upon which the price is paid entirely in corporate stock of the purchasing company.

The cause of such disposition may be the inability of the corporation to carry the business on successfully; this would justify a reorganization, under which preferred stock issued, though without power, would become good eventually by acquiescence and *laches*, especially when the rights of later and innocent holders are involved.

The entire property may be sold when necessary to prevent loss, and may be bought by some of the trustees themselves; such purchase is not void, but only voidable at the election of those who may be affected thereby; and becomes good by the consent or acquiescence of those who have the right to object.

Agreements in restraint of trade are void if a general restraint, but valid if partial, reasonable, and on sufficient consideration; not larger than requisite to protect the party for whose benefit they are made, and not tending to create monopoly or unnatural prices, or to check fair and natural competition, or otherwise to injure the public.

<sup>1</sup> Discussion of corporation holding stock in another, see Chap. XVII.



The test is in each case dependent upon the circumstances, with great allowance to the judgment and discretion of the parties themselves.

### SECTION ONE.

**Holmes & Greggs Manufacturing Co. v. Holmes & Wessell M. Co., 27 N. E. 881,—N. J.—**

**Distinction shown between corporations owing and those not owing duty to the public.**

Plaintiff had sold out its whole plant to defendant, and took stock in defendant's corporation as payment; and later sold this stock to defendant and took notes as payment; then, when suing upon the notes, the defense was raised that plaintiff had no right to take the stock under the circumstances as stated. It is held, however, that while it is the general rule that a corporation can not, unless expressly authorized by law, purchase or deal in stocks of other corporations, yet it is equally true that it may do whatever may be necessary in the exercise of its corporate franchises. The selling of property and the collection of debts is among the powers given, and, hence, it may take title to all kinds of property, even the stock of another company, in the payment of a debt.

Following is the opinion in full:

HAIGHT, J.: This action was brought to recover the amount of a promissory note, bearing date December 1, 1884, executed by the defendant The Holmes & Wessell Metal Company, and indorsed by the defendants Morse and Shonnard. The defenses were *ultra vires*, no consideration, and a non-tender of certain stock for the purchase price of which the note was given. The plaintiff is a manufacturing corporation, organized under the general act of 1848, for the purpose of manufacturing sheet and rolled brass wire, tubing and other articles composed wholly or in part of metal, in the city of New York. Its president was Charles E. L. Holmes, and its secretary and treasurer was George C. Edwards. On the 12th day of July, 1881 Holmes and Edwards entered into an agreement with the defendants, Shonnard, Morse, and one Charles Wessell, to organize a new company for the manufacture of brass, nickeline al-

loys and other composite metals, under the corporate name of the Holmes & Wessell Metal Company. The capital stock of such company to be \$100,000, the whole amount to be issued and paid up in cash; three-fourths of which to be subscribed and paid by Holmes and Edwards, and the remaining one-fourth by the other parties to the agreement. The agreement, in its preamble, recites that Holmes and Edwards propose to transfer the rolling mill belonging to the plaintiff, including all the machinery, tools and appliances connected therewith, together with the lease of the premises occupied by the plaintiff, for the sum of \$50,000. Subsequently, and at an annual meeting of the plaintiff's stockholders, held on the 20th day of July, 1881, the president and secretary were instructed to sell to the Holmes & Wessell Metal Company the entire machinery and plant owned by the plaintiff, for the sum of \$50,000; and also authorized them to sell to the same company all the material manufactured, unmanufactured and in process of manufacture owned by the plaintiff; and to also subscribe for 3,000 shares of the capital stock of the company, and to pay for the same out of the proceeds of the sale of the mill and materials.

It also appears that the Holmes & Wessell Metal Company was incorporated on the 15th day of July, 1881, and that Charles E. L. Holmes subscribed for 2,000 shares, and George C. Edwards 1,000 shares of the capital stock. Thereafter, and on the 23d day of July, 1881, the new company, at a meeting of its stockholders, authorized the purchase from the plaintiff of its plant and machinery, and to pay therefor the sum of \$50,000, and for the entire stock of materials, manufactured and unmanufactured, owned by the plaintiff, the sum of \$31,333.96; and, on the first day of September, thereafter, such sale was completed by the transfer of the plaintiff company to the defendant company of its entire plant, machinery, etc., and, in payment therefor, the defendant company issued to George C. Edwards, trustee, the stock subscribed for by Holmes and Edwards, amounting to \$75,000, and the balance, \$6,333.96, was paid in cash. After such transfer the plaintiff discontinued its business.

On the first day of December, 1884, the plaintiff entered into a contract with the defendants, Morse; Shonnard and said

Charles Wessell, in which the plaintiff agreed to sell to the other parties thereto 1,440 shares of stock of the defendant company standing in the name of Edwards, as trustee, for the sum of \$30,000, payable, \$5,000 in cash and the balance by certain promissory notes, of which the note in suit is one. The agreement further provided that the stock should remain in the name of Edwards, or some other officer of the plaintiff as trustee; that it might be voted upon by him until delivered as specifically provided in the contract.

It is doubtless true that a corporation can not purchase or deal in stocks of other corporations unless expressly authorized by the law so to do. *Talmage v. Pell*, 7 N. Y. 328; *Berry v. Yates*, 24 Barb. 200; *Milbank v. N. Y., L. E. & W. R. R. Co.*, 64 How. Pr. 20; *Mechanics Mut. Savings Bank v. Meriden Agency Co.*, 24 Conn. 156; *Central R. R. Co. v. Pennsylvania R. R. Co.*, 31 N. J. Eq. 475; *Hazlehurst v. Savannah R. R. Co.*, 43 Ga. 57; *Valley R. Co. v. Lake Erie Iron Co.*, 18 Northeastern Rep. 486; *People ex rel. v. Chicago Gas Trust Co.*, 130 Ill. 268-284; *Franklin Co. v. Lewiston Institute for Savings*, 68 Me. 43; *Hill v. Nisbet*, 100 Ind. 341-349.

It is equally true, however, that it may do whatever may be necessary in the exercise of its corporate franchises. The selling of property and collection of debts is among the powers given; and hence, it may take title to all kinds of property, even the stock of another company, in the payment of a debt. *Talmage v. Pell*, *supra*, and cases above cited.

The statute under which the plaintiff was incorporated provides that "it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation." (Laws 1840, Chap. 40, § 8.) The funds here spoken of evidently mean the money of the company, and the statute was not intended to limit the powers of the corporation beyond that already indicated.

The plaintiff was a private manufacturing corporation. It exercises no power of a public nature, and has attempted no combination by which the public may in any manner be prejudiced. There are, consequently, no questions affecting public policy to be considered. The purpose of the company is expressed in a preamble to the resolutions adopted, authorizing the sale of its plant and stock of materials on hand to the de-

fendant company. It was, in short, to increase the business of the stockholders by adding to the manufacture of brass that of German silver and nickel alloys. The scheme adopted was the organization of a new corporation, bringing in some other persons with additional capital. The stock in the new company was subscribed for by Holmes and Edwards individually, and the stock, when finally issued, was issued to Edwards. It is true, he takes it as trustee and holds it as such for the plaintiff, but this we do not regard as necessarily *ultra vires*. The plaintiff had the right, with the consent of its stockholders, to sell its plant and retire from business; and it appears from the evidence in this case that the consent of all the stockholders was given to the sale that was made.

In *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159-186, Folger, J., in delivering the opinion of the court, says that "A corporation may not do acts which affect the public to its harm, inasmuch as they are *per se* illegal, or are *malum prohibitum*. Then no assent of the stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interests of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders, dealing in good faith with the corporation, will be protected in a reliance upon those acts."

In the case of *Treadwell v. Salisbury Mfg. Co.*, 7 Gray 393-405, it was held that the directors of a manufacturing corporation may sell the whole property of the corporation to a new corporation, taking payment in shares of stock in the new company, to be distributed among the stockholders of the old company. In *Howe v. Boston Carpet Co.*, 16 Gray 493, it was held that one manufacturing corporation may take the shares of another in payment of a debt. Chapman, J., in delivering the opinion of the court, in commenting upon the case of *Treadwell v. Salisbury Mfg. Co.*, *supra*, says that "while corporations *quasi* public may be restrained and directed in the management of their affairs, yet corporations established for trading and manufacturing purposes may wind up their affairs whenever they think proper to do so, and in the manner adopted in that case. The legality of the transaction could not have depended on the intention of the corporation to wind

up its affairs immediately. If it had taken the stock in the payment for goods, or for the sale of a building or land, or water power, which it did not want or desire to sell, while it still carried on its business, the act must have been equally legal."

In *Hodges v. New England Screw Co.*, 1 R. I. 312-347, the facts were, in many respects, similar to those under consideration. Greene, Ch., J., says: "Nor have we any doubt that the screw company might have rightfully taken this stock in the iron company in payment for their rolling mill, if it had been taken with a view to sell it again, and not permanently hold it. Again, it is to be observed the directors were not investing the funds of the screw company in the stock of the iron company. They had on hand an unsalable rolling mill, and they owed a heavy debt for it, and one great object in taking the stock in the iron company was to realize for the rolling mill, and in part pay thereby the debt." *State of Kansas v. Western Irrigating Canal Co.*, 40 Kas. 96; *Leathers v. Janney*, 41 La. 1120; *Hibernia Insurance Co. v. St. Louis and New Orleans Transp. Co.*, 8 Federal Rep. 516; *Taylor v. North Star Gold Mining Co.*, 76 Cal. 285; *Miners Ditch Co. v. Zellerback*, 37 Id. 543; *State v. Butler*, 86 Tenn. 614; Morawetz on Private Corporations, Sec. 212.

The plaintiff has sold its rolling mill, machinery, etc., to the defendant. It has taken stock in the latter company in payment therefor. Inasmuch as this was done with the consent of all the stockholders, it being the act of a private corporation, not in any manner harming the public, we see no reason for condemning its title to the stock so obtained. *Palmer v. Cypress Hill Cemetery*, 122 N. Y. 429-435.

But assuming the action to have been *ultra vires*, the defenses interposed would still be unavailable. The plaintiff has the stock and has paid for it. It can not be recovered back by the defendant, for the transaction is completed and closed. While the contract remained executory, if it was unauthorized, a stockholder or person interested might have interfered by injunction, and prevented the transfer of the property of the plaintiff to the defendant. But the contract having become executed, the title of the stock now vests in the plaintiff, and it has the power to sell and dispose of the same. *Sistare v.*

Best, 88 N. Y. 527-543; Milbank v. N. Y., L. E. & W. R. R. Co., *supra*.

The contract under which the note in suit was given was made in December, 1884, nearly four years after the plaintiff became the owner of the stock. No claim is made that that contract is for any reason illegal or void. Numerous cases are found in which the courts have refused to execute contracts that were *ultra vires*, but this action is not based upon such a contract. The courts will not permit the plea of *ultra vires* to prevail whether interposed for or against a corporation, where it would not advance justice, but would accomplish a legal wrong. Rider Life Raft Co. v. Roach, 97 N. Y. 378-381; Whitney Arms Co. v. Barlow, 63 Id. 62.

To hold that the plaintiff could not dispose of the stock would deprive it of the consideration received for the transfer of its rolling-mill and material, thus accomplishing a wrong and not advancing justice.

Our conclusions are that it had title to the stock and that, consequently, there was a valuable consideration for the note in suit.

The question raised in reference to non-tender of the stock was properly disposed of by the general term.

The judgment should be affirmed with costs. All concur. Judgment affirmed.

## SECTION TWO.

**Taylor v. North Star Gold Mining Co., 70 Cal. 285; 21 Pacific Rep. 753.**

**Transfer of mine because of inability to operate it; new corporation makes payment with its own stock; question of *ultra vires* can not be collaterally raised.**

The defendant, a mining corporation, being unable to develop its mine, transfers the same to another corporation and takes stock of the latter as payment. The new corporation had the means to make the mine a success. In the course of the negotiations for and consummation of this plan of reorganization, the defendant, which kept up its own organization, incurred some debt and levied an assessment to pay it; plaintiff objected thereto on the ground that it was *ultra vires*, and brought his action to set the assessment aside. The fraud,

though alleged, is not proved. The question of *ultra vires* does not arise. The company was compelled to make the assessment; it could not refuse to pay a debt because it arose for money borrowed, which money was used to pay expenses which were incidental to an act, *ultra vires*.<sup>1</sup> There may be cases where auxiliary operations are so inseparably connected with the main act that they would have to fall with it; but this case does not present features of that character.

### SECTION THREE.

**Kent v. Quicksilver Mining Co., 78 N. Y. 159.**

**Reorganization deemed valid by acquiescence.**

Bill in behalf of the minority of the original stockholders to declare void a plan of reorganization whereby all the original stock was called in and new stock issued, giving to each in the same proportion as he held before and in proportion to the value of the whole property, excepting that those who paid \$5 per share extra should obtain preferred stock.

The court distinguishes this from a loan, finding that to make a loan would clearly be authorized.<sup>2</sup> The corporation could at its origin have divided the stock into classes, but did not do so; on the contrary it placed all stock on an equality by its by-law, which by-law became as much the law of the corporation as if embodied in the charter.<sup>3</sup> Owning a share gives a right which can not be divested, unless the power has been reserved.<sup>4</sup> To divest this right by making a preferred class is not the exercise of the power to borrow money and is in violation of the constitutional provision which forbids the impairment of vested rights. It is unnecessary to say that a corporation never has this power; it is decided only that under the facts of this case no such power exists. Nor does it exist under the power to make or alter by-laws, for these must be

<sup>1</sup> Bradley v. Ballard, 55 Ill. 413.

<sup>2</sup> Presbyterian Church v. City of

<sup>3</sup> Curtis v. Leavitt, 15 N. Y. 9; and New York, 5 Cow. 588; Grant on if it were a loan it would probably Corp'n. page 80.

not be condemned as usurious. Laws <sup>4</sup>Mich. Bank v. N. Y. & N. H. R. of 1850, Ch. 172; 1 Story Eq. Juris. R. Co., 13 N. Y. 599-627.

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reasonable and not destructive of vested rights.<sup>1</sup> It is claimed that the present holders, being innocent purchasers for value, had the right to rely upon the appearance of regularity and validity of the stock, and that the act of issuance presupposes authority,<sup>2</sup> being apparently in the corporate scope.

These questions need not be decided; the plan of reorganization was openly and publicly made known; the proceedings were regular and on due notice, the new subscriptions were publicly taken, circulars and advertisements made them known, the new common and preferred stocks were listed in the exchanges and publicly quoted and dealt in for four years before the validity of the plan was called in question by the minority, and they must therefore be held to have ratified the same and assented thereto. Where the question concerns only the stockholders, corporate acts *ultra vires* may become valid by consent or acquiescence,<sup>3</sup> and certainly will be upheld rather than to be declared invalid to the harm of third persons; because the trust for the stockholders is not of a public nature.<sup>4</sup> The rule as to acts *malum in se*, or expressly prohibited, or otherwise illegal or affecting the public, is different.<sup>5</sup> Hence the minority are estopped from now complaining, inasmuch as the stock is now held by third parties, who bought it in open market while the minority were neglecting to "promptly and actively condemn the unauthorized act" though aware of it. Estoppel applies as well to members of corporate bodies as to persons acting in a natural capacity.<sup>6</sup> Where there is delay through neglect, during which time advantages have been gained by the corporation, relief should be denied, if thereby evil fall upon innocent persons.<sup>7</sup> Nor does the rule as to executory contracts apply; the present holders have their stock by virtue of executed transactions; they can not be put back into

<sup>1</sup> The Masters, etc., v. Green, 1 Ld. Exch., 890; Whitney Arms Co. v. Bar-Raym. 113; Rex v. Cutbush, 4 Burr. 2204; R. W. Co. v. Allerton, 18 Wall. 233; Gray v. Portland Bank, 3 Mass. 363; Grant on Corps. 91.

<sup>2</sup> Chautauqua Bank v. Risley, 19 N. Y. 869; Nelson v. Eaton, 26 N. Y. 410.

<sup>3</sup> Bissell v. Michigan S., etc., R. R. Co., 22 N. Y. 269.

<sup>4</sup> Taylor v. C. & M. Ry Co., 2 L. R.

<sup>5</sup> Ashbury Railway Co. v. Riche, 7 Eng. & I. App. L. R. 653.

<sup>6</sup> 2 Story Eq. Jur., § 259.

<sup>7</sup> Zabriskie v. Cleveland R. R. Co., 23 How. (U. S.) 395; Evans v. Smallcombe, 3 H. of L. Cas. L. R. 249.



the situation in which they were when they bought, by any terms proposed by the corporation or by the common stockholders. Both parties would not now have the same position as if no contract had been made.<sup>1</sup> It can not be said that the contract was extortionate or unconscionable; in consideration of the \$5, the company undertook to pay yearly \$7, if earned; the company needed the money, and the chances to the investors may have been desperate; the same offer was made to the minority, and they declined to invest thereon; even unconscionable arrangements will not be disturbed when ratified with full knowledge of all their bearings and after time for consideration.<sup>2</sup>

#### SECTION FOUR.

**Skinner v. Smith**, 134 N. Y. 240; 81 N. E. R. 911.

**Manufacturing company may cease business, and alienate property, when necessary to prevent loss.**

Action by a trustee of a corporation, brought against its officers to set aside alienations of the corporate property, made or authorized by the individual defendants to themselves, who were, at the time, a majority of the trustees of the corporation, and also to compel them to account for all sums and property received under such alienation. Complaint dismissed; affirmed.

Contract made by a corporation, through its trustees, with themselves, may be set aside, in case it injures any public interest, or the private interest of any shareholder or creditor, even though the contract or transfer was executed in good faith by the trustees;<sup>3</sup> but not all contracts by a purely private

<sup>1</sup> **Whitney Arms Co. v. Barlow**, 63 N. Y. 63; **De Groff v. Am. Linen Thread Co.**, 21 N. Y. 127; **Bissell v. Mich., etc., Co.**, 22 N. Y. 269. commendable as exhaustive digests upon questions concerning contracts by corporations for preferences and for preferred stock; stock issued contrary to the fundamental provisions of the charter; corporate acts presumed in pursuance of authority; illegal contracts not capable of ratification.

<sup>2</sup> This case, though perhaps a little outside of the exact topics under discussion, is so closely connected therewith, and so often referred to by text writers and in other decisions, that it is deemed in place here. The briefs of counsel (pages 167-176) are especially

<sup>3</sup> **Duncomb v. Railroad Co.**, 84 N. Y. 190.

business corporation are void when made with its own trustees, injuring no public or private interest; such contracts are not void but voidable, at the election of those who are affected by the fraud.<sup>1</sup>

The transfer of the patent to the defendants did not injure creditors, for there were none; it did not injure the plaintiff for he was not then a stockholder, but became one subsequently with full information upon the subject; it did not injure any public interest, for it was a purely private business concern, a manufactory of carpet looms.

Acts simply affecting the stockholders are made good by their assent.<sup>2</sup>

The right of a manufacturing company to discontinue its operations, when they have become unprofitable, for the purpose of protecting shareholders from further loss, does not admit of doubt.<sup>3</sup>

<sup>1</sup> Oil Co. v. Marbury, 91 U. S. 587-589; Thomas v. Railroad Co., 109 U. S. 522-524; 3 S. C. R., 815; Risley v. R. R. Co., 62 N. Y. 240; Barnes v. Brown, 80 N. Y. 527-536; Munson v. R. R. Co., 103 N. Y. 58-78; 8 N. E. R., 355; Barr v. R. R. Co., 125 N. Y. 263, 277; 26 N. E. R., 145.

<sup>2</sup> Kent v. Mining Co., 78 N. Y. 159.

<sup>3</sup> Treadwell v. Manufacturing Co., 7 Gray, 395; Hancock v. Holbrook, 9 Fed. Rep. 353; Boston, etc., R. Co. v. New York, etc., R. Co., 13 R. I. 263; 1 Wor. Corp., § 413, *et seq.*; 2 Wor. Cor., § 1004; Bedford v. Packet Co. 69 Mo. 611.

That a private corporation owing no public duty may dispose of its property the same as an individual, see Benbow v. Cook (N. C.), 20 S. E. R. 453.

The recent case of People v. Ballard et al. (N. Y.), 82 N. E. 54, seems to extend the judicial supervision of the State even over corporations owing no duty to the public. (The dissenting opinions, however, appear to have the better reason.) The case is as follows:

A New York corporation, organized under the general manufacturing act, had, substantially, all its capital invested in mines in California. The object for which it was formed, as stated in the certificate of incorporation, was to carry on the business of mining various precious ores, and to smelt, refine and sell the product. The defendant trustees transferred all the assets of this corporation to another corporation organized under the laws of the State of California, for the purpose of carrying on the business theretofore conducted by the New York company, and of taking title to its assets. This was done with the approval of the stockholders holding a majority of the stock, in good faith, to save the property from sacrifice, but without the consent of the holders of a large number of shares, and against the protest of some of the stockholders. The sole consideration was that the California company agreed to pay the debts of the New York company and to issue to it certain shares of the capital stock. A majority of the di-

rectors of the California company were residents of that State; and the only object of the transaction was to reorganize the New York company under the laws of another State.

This action is by the attorney-general to remove the trustees and to compel them to account for the property thus transferred.

Various statutes are examined and construed, resulting in the holding that the action is properly brought by the attorney-general in the name of the People, without a relator; and it is also held that although the corporation is not one of a *quasi* public nature, yet the people have such interest in the matter that a court will decree a prevention of, or redress from, the reorganization in question.

On this latter proposition two judges dissent, nor is the majority entirely felicitous in pointing out clearly upon what grounds such interference is predicated.

The majority opinion is based in brief upon the assertion that a corporation is the creature of the statute; has only the powers conferred; can not end its own existence without taking the statutory steps of dissolution. "By the transaction complained of the defendant company was stripped of all its property and thus prevented from going on in business, and deprived of all means of carrying into effect the object of its existence. It can not sell all its property to a foreign corporation organized through its procurement, with a majority of non-resident trustees, for the express purpose of stepping into its shoes, taking all its assets and carrying on its business. That would be the practical destruction of the corporation by its own act, which the law will not tolerate. Whether the process by which it was sought to convert the New York corporation into a California corpora-

tion, is called 'reorganization,' 'consolidation' or 'amalgamation,' it was the exercise of a power not delegated and it was void. It was corporate burial in New York for resurrection in California."

The dissenting opinion (two judges concurring) concedes all these propositions, but holds that the People have no such interest in the question as requires any relief; and as the non-consenting stockholders have not complained the action should be dismissed.

The action had been dismissed in the Supreme Court, special term, 3 New York Supplement 845; dismissal sustained, Supreme Court, general term, 8 New York Supplement, 918; majority (two judges) say that the non-assenting stockholders should make the complaint, for if they had, "they would have been met with proof in mitigation of damages, of the almost hopeless condition from which the property was rescued by the united action of the trustees and the majority of the stockholders. By this action brought, no doubt, in good faith by the attorney-general upon their representatives" (representations?) "the non-assenting stockholders are enabled to evade this situation; and if they were successful, the statute would have been utilized, in the name of equity, to work real injustice."

One judge dissents and holds the action maintainable, relying upon *Abbott v. Rubber Co.*, 33 Barb. 578; *Frothingham v. Barnley*, 6 Hun 372; *Taylor v. Earle*, 8 Hun 1; *Blatchford v. Ross*, 54 Barb. 42; *Metropolitan v. Manhattan*, 14 Abb. N. C. 108; *Copeland v. Gaslight Co.*, 61 Barb. 60; *Stevens v. R. R. Co.*, 29 Vt. 545; *R. R. Co. v. Harris*, 27 Miss. 517; *Ry. Co. v. Allerton*, 18 Wall. 283; and distinguishing *Treadwell v. Manufacturing Co.*, 7 Gray 393; *Hancock*

v. Holbrook, 9 Fed. Rep. 353; Buford v. Packet Co., 69 Mo. 611; Ditch Co. v. Zellerback, 37 Cal. 543; Hodges v. Screw Co., 1 R. L. 812, 847; Wilson v. Proprietors, 9 R. I. 590.

The Court of Appeals in its opinion sustaining the action relies upon some of the foregoing cases, as also upon Mann v. Butler, 2 Barb. Ch. 362; R. R. Co. v. Croswell, 5 Hill 383, 386; Taylor v. Earle, 8 Hun 1; Smith v. Stage Co., 18 Abb. Pr., 419; Mor. Corp. § 413; Spelling, Friv. Cor., § 1012; Cook, Stock & S., § 667; Beach, Pr. Cor., § 358, 430.

This formidable array of authorities does not, however, satisfy the reader upon the question that as to a private business corporation, not even

of a *quasi* public nature, relief should be given only upon complaint of parties injured, and not on information by the public, no injured party being relator. The cases cited present instances of complaint by the individuals aggrieved.

The cause was again before the Court of Appeals (32 N. E. 611) upon application for re-argument, especially upon the point that the transactions were absolutely necessary, because the New York corporation found itself unable to conduct its business without a loss. Re-argument is refused, the court saying that the matter can be fully considered on the next hearing below, and thence later on appeal.

## SECTION FIVE.

**Oregon Steam Navigation Co. v. Winsor, 20 Wall. 64.**

**Contract, withdrawing steamboat from particular route, sustained.**

Suit by the Oregon Steam Navigation Company against Winsor and others for recovery of \$75,000 as stipulated damages for breach of an agreement. Facts were as follows: In 1864, the California Steam Navigation Company (in business in California) sold to the plaintiff (in business in Oregon and Washington) the steamer New World for \$75,000, plaintiff agreeing that said vessel should not run nor be permitted to run in California for ten years from May 1, 1864; plaintiff, subsequently, on February 18, 1867, sold said boat to defendants for the same price, and on the condition that she should not be run in California, nor on the Columbia river and its tributaries for ten years from May 1, 1867; the damage on breach of said condition was fixed at \$75,000. Said condition was broken; plaintiff's petition for damage was dismissed in the lower courts, on the ground that the condition was in restraint of trade and against public policy.

The Supreme Court reverses the decision, and holds the contract valid. (Clifford, Swayne and Davis, J. J., dissent.)

The principle is that, though an agreement in general re-

straint of trade is void, yet one in partial restraint, if reasonable and on a sufficient consideration is valid.<sup>1</sup> The restraint must not be larger than requisite to protect the party with whom it is made.<sup>2</sup> A contract not to use a trade anywhere in England is void, but not to use it in a particular locality, if on a good consideration and for a proper and useful purpose is valid;<sup>3</sup> not to exercise a trade in a particular state, generally held invalid because it would compel a man to transfer his residence and allegiance to another state, to pursue his avocation.<sup>4</sup> Such rules, however, owing to our circumstances and to this being one country, do not control every case. The reason of the rule when applied is, first, that the public should not be deprived of the restricted party's industry; secondly, that he should not prevent himself from pursuing his occupation and from supporting himself and his family. But these injuries do not result from a partial and reasonable restriction founded on a consideration, and protecting the purchaser of the trade, business or thing. Whether it is reasonable, depends in each case on the circumstances, and from the uncertain character of the subject, much latitude must be allowed to the judgment and discretion of the parties themselves.

The contracts in question did not destroy the usefulness of the steamer, it simply transferred it to another company and another state; it involved no removal of the vendee nor cessation of business; it was necessary to protect the purchaser; business and commerce in general were rather facilitated than otherwise.

The plaintiff's agreement with its vendor covered the ten years, 1864 to 1874, as to California; but plaintiff's agreement (made in 1867) with its vendee (the defendant) covered the ten years, 1867 to 1877, as to California and Oregon. Latter agreement was valid as to Oregon, where plaintiff operated, for the whole ten years, to 1877, but as to California, where plaintiff did not operate and where it needed the agreement only to protect itself in its promises to the California Company, the agreement was valid only for the *seven* years, 1867 to 1874, and

<sup>1</sup> Chitty on Contracts, 576, 8th American Edition.

<sup>2</sup> Williams' Saunders, 156, note 1.

<sup>4</sup> Taylor v. Blanchard, 13 Allen 875;

<sup>3</sup> Ib., Tindal, C. J., in Horner v. Dunlop v. Gregory, 6 Selden 241. Graves, 7 Bingham 743.

invalid because unnecessary and unreasonable for the *three* years, 1874 to 1877.

These contracts are divisible; the good will be enforced and the bad rejected.<sup>1</sup> In *Price v. Green*, carried through all the courts, the contract was not to exercise the trade of a perfumer in London or within 600 miles; held good as to London. In *Nicholls v. Stretton*, an apprentice was to serve five years with an attorney and was thereafter not to be considered as attorney for any person who had been client of his employer during said five years, or who should at any time thereafter become his client; this was held good as to the clients during said five years, but bad as to the rest.

The contract in question is good as to California until 1874, and as to Oregon for the full time, that is to 1877.

#### SECTION SIX.

**Sharp v. Whiteside**, 19 Fed. Rep. 156.

**Park belonging to individual, though offered to public use, may be restricted in its use to the patrons of a certain railway.**

On the question of contracts in restraint of trade, this case can be consulted with profit. It holds that the owner of a park which was resorted to, and had been for years, by the public on payment of an admission fee, had a right to admit to the park only such persons as were conveyed to it by one line of carriers, and could refuse admittance to those carried by the other.

#### SECTION SEVEN.

**Mr. Wharton's views.**

Of still greater interest and value is the nine-page note by Francis Wharton appended to the above decision, with numerous citations upon the following topics: (1) Restriction of public duties. (2) Agreements not to do business or work in a particular place. (3) Agreements to labor exclusively for particular persons. (4) Agreements only to provide or labor

<sup>1</sup> See Chitty, *supra*, citing Ches- 653; *Price v. Green*, 16 Id. 346; *Nichman v. Nainby*, 2 Strange 739; *Woodolls v. Stretton*, 10 Queen's Bench v. Benson, 2 Crompton & Jervis 94; 346. *Mallen v. May*, 11 Meeson & Welsby

for a particular market. (5) Agreement by a common carrier to discriminate against particular parties entitled to be accepted as customers. (6) When there is no public duty then there may be discrimination.

The learned writer concludes that the line should be drawn between such public necessities as inns, taverns, carriage, etc., and mere luxuries, as visiting parks for purpose of sight-seeing and enjoyment; and he regards it as settled that the only cases in which a party is prevented from discriminating between persons seeking to do business with him are the following: (1) Where he has the monopoly of some staple whose use is essential to the community. (2) Where, as is the case with common carriers and innkeepers, he is required by law to place all applicants, not subject to exclusion on public grounds, on the same footing.

#### SECTION EIGHT.

##### **Other instances.**

See also *Western Union Telegraph Co. v. Burlington & S. W. Ry. Co.*, 11 Federal Reporter 1, opinion by McCrary, J., that a railroad company can not give to a telegraph company the exclusive right to establish lines along its right of way, and see valuable note by Mr. Wharton to this case. See also as to telephone companies exhaustive discussion and many citations in briefs and opinion in *D. & A. T. & T. Co. v. Delaware*, 2 "C. C. A." 1.

#### SECTION NINE.

##### **Partial restraint of trade not checking competition.**

There are many instances of contracts in partial restraint of trade being upheld; these are, however, for the most part cases in which a trader has an established business, the "good will" thereof being of value and being counted upon in the purchase; consequently the purchaser places the seller under condition not to re-engage in business during such a period and within such a radius as may impair the purchased patronage; these restrictions are uniformly upheld;<sup>1</sup> and there is no reason why this should not be; as there is just as much trade



offered to the public as there was before, there being merely a substitution of owners. Cases of this sort, therefore, serve but little to illustrate the topics under discussion in this book.

### SECTION TEN.

**Dolph v. Troy Laundry Machinery Co., 28 Fed. Rep. 553.**

**Pooling permissible, sometimes, though checking competition.**

This case was as follows,<sup>1</sup> and it is highly instructive as declaring, or at all events attempting to declare, the dividing line between illegal monopolies and legitimate combination.

Facts were thus: Plaintiff at Cincinnati and defendant at Troy were competitors in manufacturing and selling washing machines; they were the principal but not the only manufacturers in this country.

"In January, 1882, in order to obviate the consequences of competition with each other and to secure better prices and better profits," they agreed for five years to divide the profits made by each, upon a fixed basis of manufacturer's price and selling price. Plaintiff also agreed to deliver, and defendant to take, a certain number of machines each year; and plaintiff had the option to manufacture all machines to be sold by either party, and to receive such price from defendant as might be

<sup>1</sup> For interesting cases and valuable notes, see *W. U. T. Co. v. B. & S. W. Ry. Co.*, 11 Fed. Rep. 1, and note 10-14; *Sharp v. Whiteside*, 19 Fed. Rep. 156 and note 164-173; *McCaull v. Braham*, 16 Fed. Rep. 37, and note 42-49; *Bickford v. Davis*, 11 Fed. Rep. 549; *Norris v. Clarke* (Minn.), 24 N. W. Rep. 128. As to contracts not to practice a profession or trade in certain place, see *Smalley v. Greene*, 3 N. W. Rep. 78; *Halderman v. Simonton*, 7 N. W. Rep. 493; *Stafford v. Shortreed*, 17 N. W. Rep. 756; and not to sell to any one but plaintiff, within two miles for five years, *Arnold v. Kreutzer*, 25 N. W. Rep. 139. Not to re-engage in business in a certain city, *Grow v. Seligman*, 11 N. W. Rep. 404.

<sup>2</sup> This case seems to have been between an individual as plaintiff and a corporation as defendant. The reasoning would, however, have been the same had both parties been individuals or corporations, as the decision deals entirely with the question whether the acts done constitute a monopoly or not; there is no question raised here as to whether they were within the corporate power of the party, as was done in the *Nebraska Distilling Co. case* (*State v. Distilling Co.*, 46 N. W. R. 155), although even in that case it was only because the acts made an illegal restraint on trade that they were held to be *ultra vires*.



ascertained by bids made on them by other manufacturers. Defendant violated the contract at the end of the first year. Judgment for plaintiff for damages, new trial granted on account of error in instructions as to the measure of damages, but cause of action otherwise sustained.

Opinion by WALLACE, J., who assumes that the parties contemplated that the defendant should cease manufacturing, and that the only purpose was to obtain higher prices, but "it is not obvious how such a contract contravenes any principle of public policy. Washing machines, although articles of convenience, are not articles of necessity. The scheme of the parties did not contemplate suppressing the manufacture or sale of machines by others." Those who thought the prices too high could get their machines made elsewhere; the law of supply and demand would counteract the tendency to exorbitant prices. It is legitimate for a trader to get the highest price he can.

It is legitimate for rivals to agree upon a scale of selling prices and a division of profits; it is not obnoxious to good morals or the rights of the public for one to discontinue business and become partner of the other. This may result in higher prices, but the public are not obliged to buy of them, and have no right to complain "so long as the transaction falls short of a conspiracy between the parties to control prices by creating a monopoly." Authorities are hardly needed on this proposition; the principle is, "public policy requires on the one hand that a man shall not, by contract, deprive himself, or the state, of his labor, skill or talent; and on the other hand, that he shall be able to preclude himself<sup>1</sup> from competing with particular persons, so far as necessary to obtain the best price for the business or knowledge when he chooses to sell it."<sup>2</sup>

<sup>1</sup> Acts such as are reviewed in the *Ainsworth v. Bently*, 14 Weekly Rep. foregoing opinion would seem to be 680; *Marsh v. Russell*, 66 N. Y. 292; now embraced in and prohibited by *Perkins v. Lyman*, 9 Mass. 522. the several statutes, state and national, aimed at the combination by persons or corporations made for fixing prices, or restricting production, or monopolizing trade or parts thereof. *Oleomargarine companies' combination*, with effect to check competition, yet not amounting to a monopoly, held legal; many authorities reviewed: *Oakdale v. Garst* (R. I.), 28

<sup>2</sup> *Pollock's Prin. Con.*; see also *Atl. R.* 978; also a watch case deal- *Jones v. Lees*, 1 Hurl. & N. 189; *ers' combination: Dueber v. How-*

## SECTION ELEVEN.

**Diamond Match Co. v. Roeber, 13 N. E. R., 106 N. Y. 473.**

**Restriction over entire United States, except Nevada and Montana, is only partial; the "Match Trust" sustained.**

Contract made by a seller with the purchaser that he will not for ninety-nine years engage, directly or indirectly, in the manufacture or sale of friction matches within the United States or Territories or District of Columbia, except Nevada and Montana, is valid, and will be enforced either by injunction or by suit for damages.<sup>1</sup> Peckham, J., dissents.

The restraint is only partial. Steam and other facilities have annihilated distances so that the entire United States stands as only a single state; and if a restraint covering the entire state be void, yet this does not cover it. We can not say that the reservation of Montana and Nevada is merely colorable. The rule concerning restraint of trade is itself "arbitrary, and we are not disposed to put such a construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial."<sup>2</sup>

## SECTION TWELVE.

**Good v. Tucker & Carter Cordage Co., N. Y. ; 24 N. E. 15.**

**Patents differ from ordinary property.**

A patentee has the arbitrary right to put his article on the

ard, 66 Fed. R. 637; 55 Fed. R. 81; restraint of trade, abounding in citations of authorities, English and American. The report of the case in W. R. 397. See also 67 Fed. R. 810. 18 N. E. R. 419, cites in a note upon

<sup>1</sup>It may be well enough to reach the point of a reasonable restriction, this conclusion, and there are probably strong grounds on which to sustain it; but it seems like whipping his Satanic majesty around the stump to call such a colorable division only partial. Mandeville v. Harmon (N. J.), 7 Atl. Rep. 37; Dolph v. Troy Laundry, 28 Fed. 553 and note; Shade Roller Co. v. Cushman (Mass.), 9 N. E. R. 629; Smith's Appeal (Pa.), 6 Atl. Rep. 251; Finger v. Haba (N. J.), 8 Atl. Rep.

<sup>2</sup>An exhaustive opinion upon the origin and extent of rule concerning

market or not to do so; hence, an agreement is valid giving its exclusive use to defendants, although it may result in the article not being put into use at all.

### SECTION THIRTEEN.

#### Sundry instances.

But if a patented article is put into a public use, then all who apply must be accommodated, provided such use be a common use; as for instance, the carrying of freight or passengers, or in this case of news and communications by means of telephones and wires. *D. & A. T. & T. Co. v. Delaware*, 2 C. C. A. 1.

Upon a consolidation, alleged to be illegal, of four rolling mills associations, only about one-tenth of the stockholders dissenting, the court refuses injunction and receiver; the consolidation is probably for the best interests of all; no fraud nor danger to the property is shown; the legal questions should not be gone into upon mere motions and affidavits. *Mills v. Hurd*, 29 Fed. Rep. 410.

Opinion by the vice-chancellor sustaining a contract in partial restraint of trade. *Ellerman v. Chicago Junction R. & U. S. T. Co. (Pork Packers' Contracts)*, — N. J., — 23 Atlantic 287.

A lease between a water company and an ice company, both having essentially the same directors, is held valid; complainants, stockholders in the former, had an equal opportunity with the others to take stock in the ice company, but refused to do so; they waited till the enterprise proved profitable and then attempted to avoid the lease. *Appeal of Shaaber (Pa.)*, 17 Atlantic 209.

### SECTION FOURTEEN.

**Thorsten Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Company, limited**, July 31, 1894 (House of Lords). Appeal cases 535 to 574 (Part V, December 1). *The Law Reports*.

**The English doctrine, past and present, concerning restraint of trade.**

Agreement unrestricted as to space, not to re-engage, etc., for twenty-five years.

Lord Herschell, L. C., rendering an opinion which is unanimously concurred in, says, *inter alia*, as to a restriction unlimited as to area and hence claimed to be void: "I think it was long regarded as established as part of the common law of England, that such a general covenant could not be supported."

"In early times all agreements in restraint of trade, whether general or restricted to a particular area, would probably have been held bad; but a distinction came to be taken between covenants in general restraint of trade and those where the restraint was only partial. The distinction was recognized and given effect to by Lord Macclesfield in his celebrated judgment in *Mitchel v. Reynolds*."<sup>1</sup>

The Lord Chancellor then makes an exhaustive analysis of the former decisions, and formulates the principle that the changed conditions of affairs, especially in commerce, require different rulings; restraint extending over the entire kingdom might now be no more efficient than formerly was one limited to London.

. Any covenant which is reasonably necessary to secure to the purchaser the benefit of his purchase is valid; provided the restraint be not so extensive as to interfere with the interests of the public. "If there be occupations where a sale of the good will would be greatly impeded, if not prevented, unless a general covenant could be obtained by the purchaser, there are no grounds of public policy which countervail the disadvantage which would arise if the good will were in such cases rendered unsalable." The restraint may be world wide in its operation; certainly it can not be against the public policy of the United Kingdom to protect a purchaser who there carries on business against the vendor's establishing a rival business in a foreign country.

And so his lordship concludes that our altered conditions justify the courts in not adhering to the rules laid down at a time when a restraint, unlimited in area was not, and could not be, reasonable; as commercial dealings then were not, and could not be, as now, world-wide.

Lord Watson, concurring: "A series of decisions based

<sup>1</sup>1 P. Williams, 181; 1 Smith's L. C. pt. 2, page 508.

upon grounds of public policy, however eminent the judges may be by whom they were delivered, can not possess the same binding authority as decisions which deal with and formulate principles which are purely legal."

He concludes his opinion that "it is not a matter of practical importance whether the admission of a restraint, unlimited in space, be regarded as a novel exception from the general rule which forbids all restraints, or as an extension of the exception upon that rule which has admitted limited restraints." "I am content to state that, in my opinion, the judgment which your lordships are about to pronounce, goes no farther than to adapt to new circumstances an old and sound exception to the general rule."

Lord Ashbourne, in the course of his opinion, remarks: "I do not know that there is a single reported case, whose facts are clearly known, where a covenant in general restraint of trade, clearly reasonable in itself and only affording a fair protection to the parties, has been held to be void."

The only test is the reasonableness of the restriction for the protection of the trade or business of the covenantee; this is "the doctrine to which the modern authorities have been gradually approximating." "I do not see anything to lead to the conclusion that the covenant is injurious to the public interests. I entirely agree with the Lord Chancellor in the propriety and prudence of not saying a word which would imply that such an important topic was ignored or lost sight of."

Lord Macnaghten summarizes his review of the situation thus: "Assuming the rule to be that general restraints are void, as being contrary to public policy, and not on any other ground, an exception must surely arise, if exceptions are admissible at all, as soon as you find that the particular case under consideration is not contrary to public policy, and so not opposed to the principle on which the rule is founded."

He narrates that in the time of Elizabeth, all restraints, whether partial or general, were void; but as this was soon found to impede sales (for no one would buy a business unless he could be protected from the competition and rivalry of the vendor), restraint, to a limited extent, was allowed. General restraints were said to be bad, merely because no one imagined that they could be reasonable. Thus, in *Mitchel v. Reynolds*,

restraint throughout the kingdom is said to be void "because of no benefit to either party and only oppressive," for, as there said, "what does it signify to a tradesman in London, what another does at Newcastle; and surely it would be unreasonable to fix a certain law on one side without any benefit to the other."

"The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule." He then gives the exceptions; restriction, reasonable "in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities. But it is not to be supposed that that result was reached all at once." He then describes its evolutions, through the various prior decisions.

Lord Morris, concurring, thinks that "the weight of authority up to the present time is with the proposition that general restraints of trade were necessarily void. It appears, however, to me that the time for a new departure has arisen, and that it should be now authoritatively decided that there should be no difference in the legal considerations which would invalidate an agreement whether in general or partial restraint of trading. These considerations, I consider, are whether the restraint is reasonable and is not against the public interest."

The manufacture of guns, gunpowders, etc., for the various governments anywhere, by the seller of the business, might prove a rivalry to the purchasers; the public does not suffer by reason of the purchaser taking the seller's place as manufacturer.

## CHAPTER IV.

## COMBINATIONS BETWEEN CORPORATIONS, OTHER THAN RAILWAY, WHICH HAVE BEEN REGARDED UNFAVORABLY.

Combinations having the purpose of limiting the product and artificially maintaining unnaturally high prices of articles of utility, will not be sustained.

Manufacturing corporations have no power to place all their property and business into the hands of agents for "trust" purposes, giving to such agents the entire management, not only of their own affairs, but also aiding them in obtaining the control of other corporations in the same line of business.

They must retain, and themselves use, the gift of corporate life received from the state, nor disregard the conditions upon which it was given.

The aggregation of wealth, caused by individuals contributing their estates to a corporation, is allowed; but the further aggregation of corporate estates with corporate estates is not allowed.

Corporation formed for the purpose of buying up the plants of, practically, all others in the same line, is such an illegal body as to have no standing in a court of equity; the evils aimed at by the statutes against pools and trusts should not be sanctioned in a court of equity, though attempted to be accomplished by the otherwise legal form of corporate organization.

Corporations have only such powers as are to them given; they have neither the express nor implied power to enter into partnership; to so do would interfere with the exclusive management of the corporation by its own officials, impair the authority of the shareholders, and involve the company in new responsibilities through agents over whom it has no control.

The power of eminent domain, the use of public streets and similar privileges, are considerations upon which corporations, like gas and water companies, and such others, owe duties to the public, and hence, they can not enter into any arrangements limiting themselves in the performance thereof.



## SECTION ONE.

## Introductory.

Illustrations of contracts in restraint of trade may be found between individuals as well as corporations; and such cases may well be here given as presenting features, which, if embraced in corporate combinations, would render the same void, in whole or at least in part. It is certain that whatever of this nature is void when agreed upon between individuals would be void between corporations, for as to the latter there would exist not only the objection that the restraint is against public policy, but the further objection that the contract was beyond the powers of the corporation; though it must be confessed that corporations and individuals stand practically upon the same footing in this respect; namely, if the restraint is reasonable and proper, individuals may enter into it, and so may corporations, if it be an incident to an otherwise legal sale or contract; but if it be unreasonable, then individuals must not enter into it, neither must corporations; the former because such act is contrary to the public welfare, and the latter because it is contrary to the public welfare, hence unlawful, and therefore beyond the powers of the corporation, which, being a creature of statute, has only such powers as the statute confers, which powers must of course be only lawful ones.

Combinations between corporations are also often assailed upon the ground that the parties entering into them thereby disable themselves from performing some public duty, and hence the combination is void. The difference in number of such instances is of course greatly on the side of corporations, but it may be suggested that there is no difference in kind or principle between such combination of corporations and the same thing done by individuals. The latter class, though comparatively much rarer, may happen, and would stand on the same footing as the former, as a matter of principle. Thus, if gas companies combine, one to take exclusively one part of the city, and the other the rest of the city, the agreement is not enforceable;<sup>1</sup> for the reason, among others, that they are with-

<sup>1</sup> Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co., 13 N. E. R. 169.



drawing themselves from the public duty of supplying gas to all who may apply; the same rule applies to railroad companies.

Now, would it not also apply to individuals, who, however, from the nature of their calling are performing a public duty, for instance, hack drivers? Could a hack driver, who holds himself out as a public carrier and thus invites people to seek him, intending to engage him and relying upon being able so to do—could he refuse to carry them because he had bound himself by contract to carry only such as another carrier should designate, or would a court compel him to observe such a contract?

A case of unlawful combination in the lumber business, participated in by a corporation and individuals, is as follows:

## SECTION TWO.

**Santa Clara Valley M. & L. Co. v. Hayes, 18 Pacific 391; 76 Cal. 337.**

### **Lumber monopoly invalid.**

Plaintiff, a corporation, agreed with the defendants, individuals, that they should deliver to it during 1881, 2,000,000 feet of lumber at \$11 per 1,000 feet. Defendants were not to sell to any one else during said period, within four designated counties, and were to pay plaintiff \$20 per thousand for any lumber sold to others. It is found that plaintiff owned three saw-mills, and that other persons owned other mills in that vicinity; that plaintiff leased some of the mills in order to limit the product and raise the prices; those mills which it could not lease, it controlled under contracts, the same as that with defendant. Contracts in general restraint of trade were void at common law; such are contracts between individuals to prevent competition and keep up the price of articles of utility.<sup>1</sup> Of a combination to limit the shipment and sale of coal to one party, thereby to maintain an unnaturally high price and prevent competition, the court says:<sup>2</sup> That such a con-

<sup>1</sup> Pom. Const. § 283; Jones v. Caswell, 8 Johns. Cas. 29; Doolin v. Ward, 6 Johns. 194; Wilbur v. How, 8 Johns. 346; Arnot v. Coal Co., 68 N. Y. 559. <sup>2</sup> Arnot v. Coal Co., 68 N. Y. 559; citing Coal Co. v. Coal Co., 68 Pa. St. 182; People v. Fisher, 14 Wend. 9; Sleeper v. Van Middlesworth, 4 Denio 434; Bank v. King, 44 N. Y. 87.

tract is inimical to the public and hence contrary to public policy and illegal is too well settled to be a question. The producer may use all legitimate efforts to obtain the best price for the article in which he deals; but when he endeavors to artificially enhance prices by suppressing or keeping out of the market the product of others, and to accomplish that purpose by means of contracts with others binding them to withhold their supply, such restraints are even more mischievous than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy and illegal.<sup>1</sup>

Plaintiff's contract attempts to suppress the supply and enhance prices; it now seeks damages for its violation; it parted with nothing when entering into the contract; when trying to bind defendant not to sell to others, it transcended a rule based on the experience of ages and found necessary for the protection of individuals and of legitimate trade. Courts have nothing to do with the results naturally flowing from the laws of supply and demand, but will not aid in enforcing agreements which take trade out of the realm of competition and thereby enhance or depress prices of commodities.

Nor is this agreement severable, and good in part,<sup>2</sup> while bad in part. If the whole vice were in the promise not to sell, that part might be set aside as bad; but the illegality is in the consideration and goes to the whole contract;<sup>3</sup> its very essence and illegal object and purpose was to form a combination to limit the product and enhance the prices and to give the plaintiff a control over the whole product.

<sup>1</sup> Salt Co. v. Guitrie, 35 Ohio St. 672; Craft v. McConoughy, 79 Ill. 349; Coal Co. v. Coal Co., 68 Pa. St. 182. United States v. Nelson, 52 Federal 646, in which Nelson, D. J., holds an indictment under act of July 2, 1890 (26 St. at Large, p. 209), insufficient

<sup>2</sup> As in Granger v. Mining Co., 59 Cal. 678; Treadwell v. Davis, 84 Cal. 601; Jackson v. Shawl, 29 Cal. 267. in alleging an agreement among lumber dealers, because, first, it fails to contain a description of the offense

<sup>3</sup> Valentine v. Stewart, 15 Cal. 404; Prost v. More, 40 Cal. 348; More v. Bounet, 40 Cal. 251; Forbes v. McDonald, 54 Cal. 98; Arnot v. Coal Co., 68 N. Y. 559. and a statement of the facts constituting it, and second, it does not show that the agreement involves an absorption of the entire traffic and that it is entered into for the purpose

The distinction between a legal and illegal combination is given in commodity with the object of extortion.

## SECTION THREE.

**American Preserves Trust v. Taylor Mfg. Co., 46 Fed. 152.**

**“Preserve Trust”: Bill in the Federal Court, Missouri, to enforce performance of a contract in restraint of trade; opinion by Thayer, J.**

A corporation organized for manufacturing preserves, has no power to become a member of a trust, or to place its property in the hands of the trustees thereof with very extensive powers, for instance, such as purchasing other plants or the stock thereof; organizing other corporations and controlling them, by owning their stock in whole or in part. A corporation will not be bound by any such agreement, nor by its promise not to re-engage in the business for twenty-five years; specific performance will not be enforced in equity, even though the defendant received a valuable consideration and retains the same. The court finds that that was not the sole consideration.

The defendant was admitted into the trust and to the benefits thereof, in part, upon the consideration of its promise to discontinue the manufacture and sale of preserves. The American Preserver's Trust was an organization formed originally by the stockholders of seven foreign corporations, located in different parts of the United States, all of which were engaged in the fruit preserving business. By its plan of operation all the constituent companies placed their plants and properties in the hands of nine trustees with full power to operate and manage the same, to issue trust certificates, based on the earning capacity of the plants, to the stockholders in lieu of their stock, to purchase or lease other plants, to organize other corporations to carry on the fruit preserving business, to sell any of the property in their possession, to declare dividends based on the trust certificates. “It is a proposition which admits of little doubt that the Taylor Manufacturing Company exceeded its powers in signing and becoming a party to the trust agreement. By so doing it, in effect, united with the other corporations and individuals who signed the agreement, in creating a partnership or joint stock concern, and in furtherance of that enterprise it undertook to appoint agents to manage the concern in its behalf, and to vest such agents with authority to buy and lease property in all parts of the United States, to

obtain and exercise control over other corporations by acquiring their stock, and with power likewise to issue negotiable securities without limit, and to declare dividends thereon. In all of these respects I must conclude that the defendant corporation, by executing the trust agreement, undertook to exercise powers to which it could lay no reasonable claim by virtue of the law (Missouri) under which it is organized, and from which all of its powers are derived." It is immaterial, even if true, that the trust was formed for the purpose of securing an economical, proper and satisfactory conduct of the fruit preserving business and an intelligent co-operation therein, and that its effect has been to create a better market for the sale of green fruits, more economical methods of manufacture, to produce a better class of goods free from deleterious substances, etc. "The question now before the court is whether a business corporation, organized under the laws of this state, has the right to become a member of such an association, or to appoint agents with such extensive powers, and that inquiry must be answered in the negative."<sup>1</sup>

The same case is found on a preliminary hearing in 43 Federal 711; injunction was there refused because it was not shown that the defendant had entered into the agreement in question, the contracts of the stockholders not being obligatory on the corporation.<sup>2</sup>

The opinion in the 46 Federal is rendered in sustaining a demurrer to the bill; the bill showing by sufficient averments that the defendant had entered into the agreement, and had thereby agreed, among other things, to abstain for twenty-five years from manufacturing preserves, and had violated said condition.

#### SECTION FOUR.

##### The author's comments on the last case.

The opinion in the last case certainly goes further than any announced in the citations on which it relies. Inherently there

<sup>1</sup> Citing *People v. Refining Co.*, 121 N. Y. 582; 24 N. E. R. 834; *Mallory v. Oil Works*, 86 Tenn. 598, 85 S. W. R. 396; *State v. Distilling Co. (Neb.)*, 46 N. W. R. 155; *Mills v. Upton*, 10 Gray 596.

<sup>2</sup> Citing *Pullman's Palace Car Co. v. Missouri Pacific Ry. Co.*, 155 U. S. 587; 6 S. C. R. 194; *Moore, etc., v. Towers*, 87 Ala. 206; 6 So. Rep. 41; 13 Am. St. R. 23 and citations; *Davis, etc., Co.*, 20 Fed. Rep. 700.

seems to be no reason why a corporation (not charged with any duty to the public) may not, the same as an individual, turn all of its property over to an agent, or burn it up or throw it into the lake, if it see fit to do so, so long as none of its creditors or stockholders complain. The citations are based upon an allegation and showing that an offensive monopoly had been created; one which at common law would have been obnoxious if entered into between individuals; but the principal case fails to disclose anything of the sort; there is no allegation that the trust had absorbed all, or nearly all, of the plants in the country, or even a large proportion thereof, or had the means and design so to do. Possibly the twenty-five-year restriction was an unreasonable one, and hence, equity's aid to enforce it was properly withheld, just as it would have been had the question arisen between individuals; it would be presumptuous to criticise the decision of the cause; but it is certainly permissible to look into the reason assigned, which is simply and solely that the defendant had no power to enter into an agreement placing its affairs into the hands of agents; and though this may be true, yet the question arises whether any one but a stockholder or creditor can make that objection.

There is nothing contrary to the public good in a corporation doing so, excepting when it creates a monopoly or when the corporation is of a *quasi* public nature. Then it owes duties to the public, and by accepting its charter and other great privileges it pledges itself to perform those duties, and can not thereafter neglect the same, nor abdicate its functions without the consent of the legislative power which created it.

Thus in *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 11 S. C. R. 478, this distinction is clearly recognized.

In that case the Central Transportation Co. leased its road and cars for ninety-nine years to the Pullman Palace Car Co., and agreed during that period not to make or run any cars. The latter company agreed to pay certain rents; and it seems that the existence of the former company was to be continued for the sole purpose of receiving such rents and paying them out as dividends to its stockholders. The court held this agreement void, not only because it is in restraint of trade, but also

and chiefly because it is an abandonment by the plaintiff of its duties to the public. The court describes the qualities and purposes of the plaintiff corporation and says: "The plaintiff therefore was not an ordinary manufacturing corporation, such as might, like a partnership or an individual engaged in manufactures, sell or lease all its property to another corporation,"<sup>1</sup> but being chartered for transporting passengers it had a public employment which it can not abandon without legislative consent.

### SECTION FIVE.

**People v. North River Sugar Refining Co., 24 N. E. R. 884; 121 N. Y. 582**

**"The Sugar Trust": Corporations must not aggregate their capitals. unless by statutory consolidation.**

The case of *The People v. North River Sugar Refining Co.*, can be analyzed as follows: The defendant and nineteen other corporations organized a trust, consisting of eleven directors called a "board," to whom all the stock of the twenty corporations was transferred, and the board in turn issued and delivered its own certificates for corresponding amounts to the stockholders of each of said corporations respectively. This board was vested with full power to act over and control each of the corporations, operating them or shutting them down as it saw fit. All the earnings received from them all, were divided among them all proportionately.

The agreement by which this board was created was alleged to be illegal, not as violating any particular statute, but as contrary to the public good; and proceedings in *quo warranto* were brought in behalf of the people by the attorney-general to dissolve the defendant corporation for having entered into this combination and trust.

The opinion is that it is not every wrong done by a corporation which gives the ground for dissolution. The transgression must not be merely formal or incidental, but material and serious, and such as to harm or menace the public welfare, for the state does not concern itself with the quarrels of pri-

<sup>1</sup> *Ardesco Oil Co. v. North American Oil Co., 66 Pa. St. 875; Treadwell v. Manufacturing Co., 7 Gray 893.*

vate litigants. The Code allows a proceeding for forfeiture of charter "when the corporation has violated any provision of law, whereby it has forfeited its charter, or become liable to be dissolved by the abuse of its powers." Ground for forfeiture is described by the court as "some misdemeanor in the trust injurious to the public." The court then finds that in turning over all the property it was not a sale as contended, but a trust, and that the corporation had exceeded its powers; although the combination agreement was not shown to have been formally adopted at a meeting of its board of directors, it is still a corporate act, as all stockholders and directors agreed to it and allowed the corporate property to be taken.

The court then considers the question whether an act thus in excess of power threatens or harms the public welfare. The effect of the defendant's action clearly was to divest itself of the essential and vital elements of its franchise by placing them in trust; to accept from the state the gift of corporate life only to disregard the condition upon which it was given; to receive the powers and privileges merely to put them in power, and to give away to an irresponsible board its entire independence and self-control, retaining only the shell of a corporation, the stockholders deprived of their voting power and thus of the control which the charter gave them and the state required them to exercise. It has directors nominally in office, but qualified by shares which they do not own, and owing their official life to the board, which can end their power at any moment of disobedience. It can make no dividends, whatever may be its net earnings, and must incumber its property at the command of its master and for purposes wholly foreign to its own interests and duties.

At the command of that master it has ceased to refine sugar, and without any doubt, for the purpose of so far lessening the market supply as to prevent what is termed "overproduction."

"In all these respects it has wasted and perverted the privileges conferred by the charter, abused its powers and proved unfaithful to its duties. But graver still is the illegal action substituted for the conduct which the state had a right to expect."

Wealth is allowed to be aggregated, but mindful of its dangers the state reserves supervision and control where such



aggregation depends upon its permission and grows out of its corporate grants. It is a violation of law for corporations to enter into partnership.<sup>1</sup> It is inconsistent for those who act for the corporation to owe a double allegiance to two different principals, namely, to the partnership and to the corporation; "the vital characteristics of the corporation are of necessity drowned in the partnership."

It is admitted that the refineries have entered into a partnership; there is a community of interest in the fund created by the corporate earnings before division; each member of the trust shared in the profits and loss of all.

It is said the trust amounts only to a consolidation, which is permitted by statute.<sup>2</sup> But the refineries did not avail themselves of the statute, and thus come under the subjection to the prudential restraints with which the state accompanied its permission; if it had, there would be but one corporation, owing allegiance to and subject to the state, with a capital at a fair basis, instead of, as now, numerous corporations menacing to other corporations and occupying the ground which would otherwise have been left free, forming a colossal partnership, unincorporated, owing no allegiance, with a double capital and capable of elastic and irresponsible increase, dominating the range of an entire industry.

It matters not that similar results might be accomplished by an individual buying up all the refineries; the state may respect the business freedom of a citizen, and yet not add the possibility of further extension of those consequences by creating artificial persons to aid in creating such aggregations. Individuals are few who can accomplish this; but if corporations can combine and mass their fortunes in a solid trust or partnership, a tempting and easy road is opened to enormous combinations vastly exceeding in number and in strength, and in their power over industry, any possibilities of individual ownership; and the state, by allowing such unrestrained combinations, would itself voluntarily cause an aggregation of capital, which it simply endures in the individual, as the product of the free agency.

<sup>1</sup> Citing *New York & S. Canal Co. v. Fulton Bank*, 7 Wend. 412; *Clearwater v. Meredith*, 1 Wall. 29; *Whitenton Mills v. Upton*, 10 Gray 596. <sup>2</sup> Laws 1867, C. 960; Laws 1884, C. 367.



It has been established that the defendant has violated its charter and failed in the performance of its corporate duties in so material and important respects, as to justify a judgment of dissolution. In this state there can be no partnerships of separate and independent corporations, whether directly or indirectly, through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints; manufacturing corporations must be and remain several, as they are created, or become one, under the statute.<sup>1</sup>

### SECTION SIX.

**American Biscuit & M. Co. v. Klotz, 44 Federal 721.**

**"The Biscuit Trust": Monopoly can not operate under the guise of corporate organization.**

A manufacturing corporation which is formed for the purpose of buying up the plants of, practically, all the other manufacturers in the same line (in this case biscuits) with intent and effect of pooling them so as to practically, even if not wholly, prevent competition, enhance prices and produce a monopoly in a necessary article of food, is such an illegal body as to have no standing in a court of equity.

The case shows that an insignificant number of complain-

<sup>1</sup> Upon the dissolution of an illegal combination, the New York "Sugar Trust," the court appointed receivers to manage the property until the constituent corporations, which had composed the trust, could arrange a plan of reorganization and of sale of the properties, or some way of distribution among the certificate holders. This plan is deemed best for all concerned; best for the public, because it frees the corporations from their illegal relation with the trust, and permits them to resume their former powers and purposes, thus avoiding forfeiture of their charter and interruption of business; and best for the certificate holders, as it preserves the property and facilitates a speedy settlement, reorganization or distribution. *Cameron v. Havemeyer*, 12 N. Y. Supplement, 126. During the "Sugar Trust" litigation, an injunction issued to prevent the property being removed from the State until the case be decided. *Gray v. De Castro & Downer Sugar Refining Company*, 10 N. Y. S. 632. The next attack on a "Sugar Trust" is in *United States v. E. C. Knight Co.*, 15 S. C. R. 249, a most exhaustive review of the authorities, and holding that the trust formed in Philadelphia is *not* contrary to the Sherman Act of 1890. (Harlan, J., dissenting.)

ant's stock was unconditionally subscribed for, apparently enough to qualify directors; but the great mass was taken and held by irresponsible parties to be used in parceling out as full paid stock to such leading and successful bakeries throughout the country as could be induced to come in on an agreed value of the property and a large estimate of good will. Thirty-five of the leading bakeries in twelve states of the West and South have been brought in, and more are sought.

The act of Congress of July 2, 1890, prohibits "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states," and punishes "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the common trade or commerce among the several states." The act of Louisiana, approved July 5, 1890, makes illegal every contract, combination in the form of trust, or conspiracy in restraint of trade or commerce, or to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in the state, and punishes every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce within the limits of the state.

Monopoly as here meant does not include such things as exist under legislative grant; it means to aggregate or concentrate in the hands of a few, practically, and, as a matter of fact, and according to the known results of human action, to the exclusion of others; to accomplish this end by what, in popular language, is expressed in the word "pooling," which may be defined to be an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits.

The facts were as follows: The American Biscuit & Manufacturing Company was organized as a corporation and issued only a nominal amount of its shares to sundry persons to enable them to qualify as directors. Then, and such was its plan, whenever it could buy a plant it would do so and make payment by issuing its own stock for the price agreed on. In this

way it had bought some thirty-five leading bakeries in twelve different states. It thus bought defendant's bakery and took from them a lease of the premises, but left one of the defendants in possession, as agent, to run the business. Defendant ran it awhile and then dispossessed plaintiff, and declaring sale and lease and the whole scheme illegal, resumed possession for himself.

All this was done without resort to legal proceedings. Plaintiff then brought a bill asking that defendant should account, as agent, also asking for injunction and receiver. The matter came up on motion for appointment of a receiver. The opinion is to the effect that defendant can gain nothing by his ouster, because he must stand by such equities as he had before the ouster.

The position is just the same as if he were bringing a suit asking for a cancellation of the sale and lease, and that he be reinstated in the property. It is then considered that, if on such a bill, he were to ask for a receiver, the rule would apply that on a bill to impeach a deed for fraud, the court will not interpose so strongly, before the hearing, as to take away the possession from persons holding it under such deed not yet set aside by decree, unless the proof of fraud is so strong as to lead the court to the clear conviction that it will, on the final hearing, be established. Such proof is not sufficiently made here, as to the allegations of false and fraudulent representations concerning the stock which defendant asserts were made by plaintiff's agent. Hence, the court is about to deny defendant's right of possession, and is about to appoint a receiver, but observes that the exhibits indicate that plaintiff's business is not legal; a point which, it says, has been raised in the state court, but apparently abandoned when the case was removed here. The plaintiff's business is considered not legitimate. Nominally, its purpose and charter is the manufacture of biscuits and confectionery, but its real scope and purpose seems to be to combine the leading bakeries into a pool or trust, as above stated.

The evil aimed at by the above statutes is the hindrance and oppression in trade and commerce wrought by its absorption in the hands of the few, so that the prices would be in danger of being arbitrarily and exorbitantly fixed, because all competition

would be swallowed up, so that the man of small means would find himself excluded from the restrained or monopolized trade or commerce, as absolutely as if kept out by law or force.

Such is the complainant's business, and hence violative of these statutes. But even if lawful, a court of equity, having discretion<sup>1</sup> in such matter, would not aid it with the appointment of a receiver; the attempt to accumulate in the hands of a single organization the business of supplying bread itself to so large a portion of the poor, as well as the rich people of the United States, should not be favored by a court of equity; there is too much danger of excluding a healthy competition, of excluding the public from participating in a most useful business, and too much danger of multitudes of citizens being temporarily, at least, compelled to pay an arbitrary and high price for daily food.

Complainant's rights can be protected on final hearing; its stock is offered back and can be held as security for damages; to appoint a receiver might be the means of perfecting or enlarging the combination or trust. Motion for a receiver is denied.

#### SECTION SEVEN.

**Gibbs v. Consolidated Gas Co., 9 S. C. R. 558; 130 U. S. 396.**

**"A Gas Trust": corporations owing duty to the public must not disable themselves from performing same.**

A gas company, prohibited by ordinance from so doing, can not enter into a contract with another company, fixing prices and pooling profits, and requiring the one company not to extend its pipes, and, moreover such an arrangement is void, being contrary to public policy, as disabling the companies from performing their duty to the public. The companies enjoying grants from the public in the nature of eminent domain in the use of streets, owe a duty to the public from which they can not release themselves. They are, in this regard, similar to railroad companies and different from ordinary private corporations. Hence, it is held, that the plaintiff can not recover from the company for his services rendered to it in negotiating said contract.

<sup>1</sup> **Fosdick v. Schall, 99 U. S. 235.**

Following is the opinion of the court, delivered by FULLER, C. J.:

"The plaintiff sought to recover compensation for services alleged to have been rendered by him to the defendant, in securing the contract in question between the defendant and the Equitable Gas Light Company, of Baltimore. It is objected that the court erred in giving the instruction that the plaintiff was not entitled to recover, because it assumed a material fact in dispute, which should have been left to the jury, namely, that it was "for the procuring of the making" of the contract offered in evidence that compensation was claimed. The record does not show that this objection to the instruction was taken in the court below, nor does it contain any evidence tending to establish that the plaintiff claimed compensation for anything else than for services in bringing about the agreement. Plaintiff's bill of particulars is for services "in negotiating and consummating an arrangement and settlement of differences" between two gas companies, and he put the contract in evidence, and adduced proof that he carried on negotiations which "resulted finally" in the execution of it. He was general manager of a corporation engaged in the business of "the owning, improving, leasing and manipulation of gas property throughout the country," and as his company and other gas companies "had been materially inconvenienced by the fact that they were required and expected by their customers to sell their gas at the insufficient price at which it was furnished in Baltimore," he suggested "that the conflict in Baltimore should, if possible, be brought to an amicable termination," and in consequence thereof, "was employed by the Equitable Gas Light Company to bring about a settlement, if possible, with the defendant." The conflict referred to seems to have been the competition in the making and vending of gas in the city of Baltimore, which it had been the object of the General Assembly of Maryland to encourage, and the settlement to which he alludes was embodied in the contract in question, by which competition was to be destroyed and the object of the general assembly defeated.

We do not feel called upon, under such circumstances, to reverse the judgment, upon the ground that the court assumed

in the instruction a matter of fact which should have been left to the jury to determine.

According to the evidence given by the plaintiff, he informed the defendant "that he was employed and would be paid by the Equitable Gas Light Company, if he made an arrangement satisfactory to that company; and that if he should be successful in bringing about a settlement satisfactory to the defendant also, he should expect and claim to be compensated by the defendant likewise."

Since he had thus entered upon the enterprise under a specific agreement with the Equitable Gas Light Company, it is somewhat difficult to understand, upon the record, how he could impose the obligation on the defendant to pay him for doing so, upon a mere notification that he should expect from it compensation for services he had expressly agreed to render to another company, because the result might be satisfactory to the defendant—a result necessarily to be assumed if any contract was arrived at. The defendant could not, in that view, be held to have laid by and accepted services which the plaintiff would otherwise not have been obliged to perform, or could assert that he did perform only upon the expectation of being also paid by defendant. The hypotheses of fact set up by the plaintiff in the instructions he asked, and which were refused, contain nothing in respect of which testimony tending to support and establish such hypotheses would add to the mere fact of the notification of the plaintiff's expectation, and the evidence on defendant's part tended to show a denial of any obligation to pay. But apart from this, the real question submitted to us for decision is whether, even if there were no objection to plaintiff's recovery, such recovery could be allowed in view of the nature of the alleged services.

In *Irwin v. Williar*, 110 U. S. 499, 510, it was held that where a contract, void on account of the illegal intent of the principal parties to it, had been negotiated by a person ignorant of such intent, and innocent of any violation of law, the latter might have a meritorious ground for the recovery of compensation for services and advances; but when such agent "is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and can not recover for

services rendered or losses incurred by himself on behalf of either in forwarding the transaction." It is clear, from the evidence adduced by the plaintiff, that he falls within the category last described; and he makes proof of the fact that the first suggestion in the line of manipulating the gas interests in Baltimore came from himself. Hence, if the contract he brought about was forbidden by statute, or by public policy, it is evident that he could not recover, and the judgment must be affirmed.

By this contract it is recited that active competition between the two companies had resulted in expense, annoyance and loss of profits, and it was therefore provided that the price of gas to consumers should be placed at one dollar and seventy-five cents per thousand cubic feet, with a rebate of fifteen cents a thousand feet for payment within seven days, "unless the rate shall be changed by mutual agreement of the parties hereto in writing," but as the defendant had much the larger interest, it might, in case of competition on the part of any other gas company, reduce the rate at which gas should be sold "by either or both parties hereto, from time to time so long as such competition shall continue," provided it should not be put at less than one dollar per thousand feet without the written consent of both parties; that the entire net receipts from the sale of gas should be pooled and divided between the companies in a fixed ratio without regard to the amount of gas actually supplied by either; that one of the companies should lay no more pipes or mains for the supply of gas in the city; that all future pipes or mains should be laid by and remain the property of the other company; and that either party which violated any of the covenants in the contract should pay to the other the sum of \$250,000 as liquidated damages. It will be perceived that this was an agreement for the abandonment by one of the companies of the discharge of its duties to the public, and that the price of gas as fixed thereby should not be changed except that, in case of competition, the rate might be lowered by one, but not below a certain specific rate, without the consent of the other. And in the case in hand the Equitable Gas Light Company was expressly forbidden to enter into such a contract. That company was incorporated by an act of the General Assembly of Mary-



land, passed March 6, 1867, with a capital of two millions of dollars, which might be increased to three millions, and with authority to lay pipes along and under the streets, squares, lanes and alleys of the city of Baltimore, and to supply with light any dwelling house or other buildings or places whatever belonging to individuals or corporations, adjacent to any such street, square, lane or alley, and with all the rights and privileges granted to the Gas Light Company of Baltimore, by the second, third, fourth and fifth sections of the ordinances of the mayor and city council of Baltimore, entitled, "an ordinance to provide for more effectually lighting the streets, squares, lanes and alleys of the city of Baltimore, approved June seventeenth, eighteen hundred and sixteen, and the act of assembly of December session, eighteen hundred and sixteen, chapter two hundred and fifty-one, so far as the same are not inconsistent with the provisions of this act, and the said company hereby incorporated shall be liable to all the duties, restrictions and penalties [provided] for in said section of said ordinance and in said act of assembly." Laws of Maryland, 1867, pp. 207, 211, 212.

Reference to the act and ordinance of 1161, Maryland Laws, 1831-1817, c. 125, 1816, Ordinances, Baltimore, 1813-1822, page 95, does not contribute to the argument here save as indicating the design of the General Assembly to give equal powers to a competing company. Said act of March 6, 1866, § 14, further provided that "the General Assembly hereby reserves the right to alter, amend or repeal this act at pleasure." Laws of Maryland, 1867, 207, 214.

On the 3d of May, 1882, an act supplementary to the act incorporating the Equitable Gas Light Company of Baltimore City was approved (Laws of Maryland, 1882, 551, c. 337), authorizing and empowering said company to manufacture and sell gas in Baltimore county as well as in Baltimore city, and to exercise all the powers and rights conferred upon it by the acts of assembly and any amendments thereto, including the right to lay all necessary and convenient pipes, etc., in the country as well as in the city, and the fourth section of this act was as follows:

That the said company be, and hereby is, prohibited from entering into any consolidation, combinations or contract with



any other gas company whatever; and any attempt to do so, or to make such combinations or contracts as herein prohibited, shall be utterly null and void."

In *Greenwood v. Freight Co.*, 105 U. S. 13, the right to repeal the charter of a street railroad company was sustained under a provision of the general statutes of Massachusetts declaring "every act of incorporation passed after the 11th day of March, in the year 1831, shall be subject to amendment, alteration, or repeal at the pleasure of the legislature."

In *Close v. Greenwood Cemetery*, 107 U. S. 466, 476, it was said that "a power reserved to the legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right."

Similar views were expressed in *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *County of Callaway v. Foster*, 93 U. S. 567, and other cases.

The consent of the corporation was not required to the operation of such a provision as that embodied in the fourth section of the act of 1882, but if acceptance were necessary, the exercise of corporate action by the gas company after the passage of the amendment was sufficient evidence of such acceptance.

The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. *New Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; *Shepard v. Milwaukee Gas Co.*, 6 Wisconsin 539; *Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co.*, 121 Illinois 530; *St. Louis v. St. Louis Gas Light Co.*, 70 Missouri 69. Hence, while it is justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contract (*Printing, &c., Registering Co. v. Sampson*, L. R. 19 Eg. 462), yet in the instance of business of such character that it presumably can not be restrained to any extent whatever without prejudice to the

public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 West Va. 600; *Chicago, &c., Gas Co. v. People's Gas Co.*, 121 Illinois, 530; *Western Union Telegraph Co. v. American Union Telegraph Co.*, 65 Georgia, 160.

The decision in *Mitchel v. Reynolds*, 1 P. Wms. 181, S. C., Smith's Leading Cases, 407, 7th Eng. Ed., 8th Am. Ed., 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. *Rousillon v. Rousillon*, 14 Ch. D. 351; *Leather Cloth Co. v. Lhorsont*, L. R. 9 Eq. 345.

"Cases must be judged according to their circumstances," remarked Mr. Justice Bradley, in *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 68, "and can only be rightly judged when the reason and grounds of the rule are carefully considered. There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid considera-

tion and a reasonable ground of benefit to the other party, is free from objection, and may be enforced." Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or *quasi* public character, which are manifestly prejudicial to the public interest, can not be upheld.

The law "can not recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement, the making whereof was an act violating law. So that, in short, all stipulations to overturn—or in evasion of—what the law has established; all promises interfering with the workings of the machinery of the government in any of its departments, or obstructing its officers in their official acts, or corrupting them; all detrimental to the public order and public good, in such manner and degree as the decisions of the courts have defined; all made to promote what a statute has declared to be wrong, are void." Bishop on Contracts, § 549; *Woodstock Iron Co. v. Richmond & Danville Extension Co.*, 129 U. S. 643, decided at this term, opinion by Mr. Justice Field; *Trist v. Child*, 21 Wall. 441; *Irwin v. Williar*, 110 U. S. 499; *Arnot v. Pittston*, etc., *Coal Co.*, 68 N. Y. 558; *Central Salt Co. v. Guthrie*, 35 Ohio St. 666; *Woodruff v. Berry*, 40 Ark. 251, 261; *H. & N. H. Railroad v. N. Y. & N. H. Railroad*, 3 Robert. (N. Y.) 411; *Craft v. McConoughy*, 79 Ill. 346; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Central Railroad v. Collins*, 40 Georgia 582; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173.

It is also too well settled to admit of doubt that a corporation can not disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests.

"Where," says Mr. Justice Miller, delivering the opinion of the court in *Thomas v. Railroad Co.*, 101 U. S. 71, 83, "a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which dis-

tion from performing those functions,

which undertakes without the consent of the state to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state and is void as against public policy."

These gas companies entered the streets of Baltimore under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they were incorporated. At common law corporations formed merely for the pecuniary benefit of their shareholders could, by a vote of the majority thereof, part with the property and wind up their business; but corporations, to which privileges are granted in order to enable them to accommodate the public, and in the proper discharge of whose duties the public are interested, do not come within the rule. But we are not concerned here with the question when, if ever, a corporation can cease to operate without forfeiture of its franchises, upon the excuse that it can not go forward because of expense and want of remuneration. There is no evidence in this record of any such state of case, and, on the contrary, it appears that the cost of the manufacture of gas was largely below the price to be charged named in the stipulation between the parties. There is nothing upon which to rest the suggestion that the companies were unable to serve the consumers, while the record shows, on the other hand, that they simply desire to make larger profits on whatever gas they might furnish. Nor are we called upon to pass upon the validity generally of pooling agreements. Here the contract was directly in the teeth of the statute, which expressly forbade the Equitable Gas Light Company from entering into it. That prohibition declared the policy of the state as well as restrained the particular corporation.

The distinction between *malum in se* and *malum prohibitum* has long since been exploded, and as "there can be no civil right where there can be no legal remedy for that which is itself illegal," (Bank of United States v. Owens, 2 Pet. 527, 539,) it is clear that contracts in direct violation of statutes expressly forbidding their execution, can not be enforced.

The question is not one involving want of authority to con-

tract on account of irregularity of organization or lack of affirmative grant of power in the charter of a corporation, but a question of absolute want of power to do that which is inhibited by statute, and if attempted, is in positive terms declared "utterly null and void."

"The rule of law," said Parker, C. J., in *Russell v. DeGrand*, 15 Mass. 35, 39, "is of universal operation, that none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain."

We can not assist the plaintiff to get payment for efforts to accomplish what the law declared should not be done, and the judgment must be affirmed.

#### SECTION EIGHT.

**Chicago Gas Light and Coke Co. v. People's Gas Light and Coke Co.,**  
18 N. E. 169; 121 Ill. 580.

**Bill for specific performance of a contract. Trial court holds the contract invalid; the Appellate Court holds it valid; the Supreme Court holds it invalid; duties owing to the public must not be abridged.**

The Chicago Gas Light & Coke Company was incorporated by act of February 12, 1849; the People's Gas Light & Coke Company under act of February 12, 1855.

Each had the usual powers of making and selling gas and laying pipes throughout the city of Chicago.

April 21, 1862, they entered into a contract, whereby the Chicago Gas Light & Coke Co. agreed that during one hundred years it would not extend its operations into the west division of Chicago; and the other company agreed during same period not to go into the north or south division.

This contract was observed until May or June, 1886, at which time the Chicago Gas Light & Coke Co. invaded the west division and was about to lay its pipes, when the People's Company sought to restrain it from so doing, basing such assertion upon said contract.

The Supreme Court is of the opinion that as the defendant had the right to operate anywhere in Chicago, the said con-

tract bound it to avoid the performance of a duty which it owed to the public. Manufacturing gas and under legislative authority conducting it through pipes laid in the streets of cities is a business of a public character; it is the exercise of a franchise belonging to the state. The services rendered and to be rendered for such grant are of a public nature. Where the right to make and sell gas to the city and its inhabitants under the conditions here named<sup>1</sup> is conferred upon a company, it is conferred as well for the benefit of the public as of the company.

The distribution of gas through the streets under legislative authority is not an ordinary business in which every one may engage, but it is a franchise belonging to the government to be granted for the accomplishment of public objects to whomsoever and on what terms it pleases. It is a business of a public nature, promoting public convenience and safety.<sup>2</sup> The Chicago Gas Light Company was organized under a private charter granted before the adoption of the present constitution; its power is not made subject to the city council's consent; it therefore owed a duty to the public, performance of which it could not avoid by a contract with another corporation.<sup>3</sup> A company may, however, yield the "exclusive" right which it may have in a certain city or territory, provided it retains the power to operate there in common with the others if it see fit so to do. The right to exclude competition is not vested in the company for the public good, but rather against it; hence a company violates no public duty in giving up merely that

<sup>1</sup> The conditions referred to are the use of the streets under legislative and municipal consent; the opinion also calls attention to the act incorporating the first company, which gives it an exclusive privilege in Chicago until February 12, 1859; and the act incorporating the second company, which gives it the right to lay pipes in Chicago and furnish gas with consent of the city council on and after February 12, 1859, or sooner, with consent of the first company.

<sup>2</sup> Citing *Gas Co. v. Light Co.* 115

U. S. 650; 6 S. C. R. 252; *Gas Co. v. Gas Co.*, 115 U. S. 683; 6 S. C. R. 265; *Shepard v. Gas Light Co.*, 6 Wis. 539; *City of St. Louis v. Gas Light Co.*, 70 Mo. 69; 2 Mor. Corp. § 1129; 2 Dill. Mun. Corp. (3d Ed.) § 691.

Cases holding that as these companies render public services the legislature is authorized to give them exclusive privileges.

<sup>3</sup> *Railway Co. v. Mining Co.*, 68 Illinois 489; *Hays v. Railroad Co.*, 61 Illinois 423; *Thomas v. Railroad Co.*, 101 U. S. 83.

part or feature of its privileges.<sup>1</sup> From February 12, 1849, to February 12, 1859, the Chicago company had the exclusive right, and if it had during that period foregone this exclusive right, and shared with another company the right of making and furnishing gas, it would not have thereby given up its public duty, but only a privilege which had been conferred entirely for its own benefit.

As it is, however, under the contract in question, it binds itself for 100 years to surrender and abandon altogether all the right conferred by its charter to manufacture and vend gas in the West division. It "abandoned a public duty" and equity will not aid either party in the enforcement of such a contract.<sup>2</sup>

A corporation may abandon a public work for reasonable cause, but can not, by contract, disable itself from performing a duty to the public. Equity does not grant specific performance when regard of the public interest is against it. Specific performance is not a matter of absolute right but of sound discretion.<sup>3</sup>

The Chicago company had actually commenced operation in the West division when said contract was made, and it received some \$40,000 for the excess in value of its property west of the river over the other company's property east of the river, and that these properties were exchanged; it is also shown that both parties agreed to use their endeavors to obtain a transfer to the People's company of the municipal contracts held by the Chicago company in the West division. Hence it makes no difference whether the Chicago company's charter was compulsory or only permissive; or whether it was or was not bound to enter upon the business of making gas; inasmuch as it did enter therein, and commenced supplying gas to the people in the West division, a court of equity will not enforce a contract by which it agreed to abandon the discharge of its duty to the public and not to resume the same for 100 years.

The contract seeks to create a monopoly and thus thwart

<sup>1</sup> City of St. Louis v. Gas Light Co., Railroad Co. v. Railroad Co., 8 Rob. 70 Mo. 69. (N. Y.) 411; Railroad Co. v. Mathers,

<sup>2</sup> 2 Mor. Corp. § 656; Transportation Co. v. Pipe Line, 22 W. Va. 617; <sup>3</sup> Marsh v. Railway Co., 64 Ill. 414. State v. Railroad Co., 29 Conn. 588;



the legislative intent which evidently meant to have competing companies in existence after expiration of the Chicago company's exclusive period. This contract, if valid, creates a monopoly for the one in the West division, and for the other, in the other divisions. While contracts in partial restraint of trade are not invalid, yet that rule does not apply to parties engaged in a public business, and in furnishing that which is a matter of public concern to all the inhabitants of the city. If the business is so peculiar that even a partial restraint is injurious to the public, then the courts will not sanction even such partial restraint.<sup>1</sup> The right of eminent domain given to a corporation proves that its business is of a public nature; hence the right to tear up and use streets, belonging to the public, should have the same consequence.<sup>2</sup>

The contracting corporations had powers to make and sell gas, to borrow money, to lease or mortgage property or franchises; none of these express or imply any power to assign the right of operating in any division of the city, or to assign the privilege of making the gas; the right to sell gas does not include the right to sell the privilege of making the gas, nor is it incidental thereto. Corporations have only such powers as are expressed in their charters and what are fairly implied or necessary to carry them in effect. The enumeration of powers implies the exclusion of all others.<sup>3</sup> The contract was therefore *ultra vires* of both the parties thereto.

<sup>1</sup>Transportation Co. v. Pipe Line proceeding. It is considered that in Co., 22 W. Va. 617; Craft v. McCon- such case the purchasers would take oughy, 79 Ill. 346. the property for the purposes of per-

<sup>2</sup>Telegraph Co. v. Telegraph Co., forming the same duties, and thus 65 Ga. 160. the public would not suffer. Exam-

While corporations charged with a ine Pumphrey v. Threadgill (Tex.), 28 public duty can not disable them- S. W. R. 450, sustaining mortgage selves from performing the same, yet by a gas company of its property and this principle does not stand in the franchise.

way of their mortgaging their entire <sup>3</sup>Thomas v. Railroad Co., 101 U. S. property, though such mortgage may 71; Bank v. Bank, 35 Ohio St. 355; ultimately lead to foreclosure, and Balsley v. Railroad Co., 119 Ill. 68, 8 thus prevent the corporation from N. E. R. 859.



## SECTION EIGHT CONTINUED—THE SAME TRUST DISSOLVED.

**People v. Chicago Gas Trust Co., 22 N. E. 798; 130 Ill. 268.**

**Quo warranto was the proceeding brought in this case.**

The information charges that the defendant purchased and holds a majority of the shares of four gas companies, and that defendant thereby usurps and exercises "powers, liberties, privileges and franchises not conferred by law."

Defendant pleaded that it had power under its charter to make such purchase. Demurrers to pleas are overruled below. This is held erroneous; the Supreme Court decides that the demurrers should have been sustained.

The argument of the opinion is that corporations have only such powers as are expressed in the laws under which they act and such as are necessarily incident thereto; that buying stocks, even of gas companies, is not expressed nor incidental in the organization of a company formed for manufacturing gas, nor does such power arise from the fact that a company, purporting to be organized under the general incorporation acts, includes such a power in its statement for incorporation; a corporation can not thus obtain for itself powers not included under legislative grant. And furthermore, if the defendant corporation could legally buy the stock of other gas companies it could buy all the stock of all the companies and thus create a giant monopoly.<sup>1</sup>

<sup>1</sup> An exhaustive and strongly reasoned opinion, abounding in citations, among which are, powers of corporations: Railroad Co. v. Marseilles, 84 Ill. 643; Coke Co. v. Coke Co., 121 Ill. 580, 13 N. E. R. 169; Hood v. Railroad Co., 22 Conn. 1; Franklin Co. v. Institution, 68 Me. 48. As to buying shares of other corporations: 1 Mor. Priv. Corp., Sec. 431; Boone Corp., Sec. 107; Greene's Brice's Ultra Vires, page 91, note b. There is no such power unless clearly conferred by statute: Franklin Co. v. Institution, 68 Me. 48; Bank v. Bank, 86 Ohio St. 350; Milbank v. Railroad Co., 64 How. Pr. 20; Sumner v. Marcy, 3 Woodb. & M. 105; Bank v. Agency Co., 24 Conn. 159; Railroad Co. v. Collins, 40 Ga. 582; Hazelhurst v. Railroad Co., 43 Ga. 13; Berry v. Yates, 24 Barb. 199. Powers of corporations organized under general law are restricted to those mentioned in the act. Medical College case, 3 Whart. 445; Heck v. McEwen, 12 La. 97; Plank Road v. Vaughan, 14 N. Y. 546; Navigation

Co. v. Railway Co., 130 U. S. 1, 9 S. C. R. 409, and the articles are to be strictly construed against the corporation.

The alleged power is illegal if it gives the opportunity to control the other companies. It matters not whether defendant has attempted to exercise such control or not; the law looks to the general tendency of the power conferred. Greenh. Pub. Pol. 5; Richardson v. Crandall, 48 N. Y. 348; Salt Co. v. Guthrie, 85 Ohio St. 666.

Gas companies enjoy grants and owe duties of a public nature and should not be restrained therein. Coke Co. v. Coke Co., 121 Ill. 530; 18 N. E. R. 169; Gibbs v. Gas Co., 130 U. S. 396, 9 S. C. R. 553. Attempts at monopoly are unlawful, as being contrary to public policy. 2 Add. Cont. 743; Greenh. Pub. Pol. 180, 643, 654, 655, 670; Coal Co. v. Coal Co., 68 Pa. St. 173; Craft v. McConoughy, 79 Ill. 346; Railroad Co. v. Collins, 40 Ga. 582; Hazelhurst v. Railroad Co., 43 Ga. 13; Transportation Co. v. Pipe Line Co., 22 W. Va. 600.

As to restraint of trade, Chappel v. Brockway, 21 Wend. 159; Stanton v.

Allen, 5 Denio 434; 7 Bac. Abr. 22; Case of the Monopolies, 11 Coke 84; Bell v. Leggett, 7 N. Y. 176; Trist v. Child, 21 Wall. 441.

Note to opinion in 22 N. E. R. 798, cites also on restraint of trade, Lumber Co. v. Hayes (Cal.), 18 Pac. R. 891 and note; People v. Refining Co., 7 N. Y. Supp. 406; Dolph v. Machinery Co., 28 Fed. R. 558 and note; Sharp v. Whiteside, 19 Fed. R. 156 and elaborate note; Telegraph Co. v. Railway Co., 11 Fed. R. 1 and note; Carroll v. Giles (S. C.), 9 S. E. R. 422 and cases cited; Fowle v. Park, 9 S. C. R. 658.

See also in restraint of trade, recent opinion, State v. Phipps, 31 Pacific 1096—Kansas—defining the word “trade” to include “insurance,” under the Kansas anti-trust laws—and holding illegal a combination between insurance companies (Horton, C. J., dissenting). *In re Pinkney*, 27 Pacific 179, 47 Kan. 89, followed. The court also holds the Kansas statute not in conflict with the act of Congress of July 2, 1890, inasmuch as the Kansas statute should not and need not be construed so as to embrace interstate trade.

## SECTION NINE.

**Mallory v. Hananer Oil Works, 8 S. W. 396, —Tenn—.**

**“Cotton Seed Oil Trust”: corporations can not enter into partnership.**

Five corporations engaged in manufacturing cotton seed oil, formed a combination or syndicate; they selected representatives from each, and placed all the plants in their hands, with power to manage and control, each corporation to share the consequent loss or profit. This was held to be a partnership, and that the corporations have no power to enter into a partnership.

A corporation has only the powers given to it.<sup>1</sup> It has neither express nor implied power to enter into partnership.<sup>2</sup> Such a contract is wholly inconsistent with its scope and tenor of its power and duties, whether it be a strictly business and private corporation, or one owing duties to the public, such as a common carrier. The existence of a partnership would interfere with the exclusive management of the corporation by its own officials; it would impair the authority of the shareholders themselves, and involve the company in new responsibility through agents over whom it had no control.

Hence, the plaintiff corporation had the right to withdraw from the arrangement, and to recover its plant by an action of unlawful detainer against the syndicate's manager in possession thereof; nor could the latter plead that the contract was already an executed one, for as to its third year (still to run), it was only executory.

### SECTION TEN.

**Whittenton v. Upton, 10 Gray 582.**

#### **Why a corporation can not become a partner.**

A manufacturing corporation<sup>3</sup> made a written agreement with one Mason, that it would advance money necessary for his foundry and machine shop, and would divide his net profits with him. The agreement refers to the relation as that of a partnership under the name of William Mason & Company. It was a great convenience to the corporation to have control of a foundry and machine shop so near to its own cotton mills, and to have the use of Mason's patterns and patents, as provided in the agreement. The corporation was fully supplied with machinery when the agreement was made, and its directors made the agreement in order to realize profits from the manufacture and sale of machinery. The foundry at first made cotton mill machinery, but later locomotive ma-

<sup>1</sup> Thomas v. Railroad, 101 U. S. 71; 71 Am. Dec. 691; Ang. & A. Corp., Elevator Co. v. Railroad Co., 1 Pick. § 272.

703; 5 S. W. R. 52.

<sup>2</sup> Incorporated under Statute of

<sup>3</sup> 1 Mor. Priv. Cor., § 421; Whittenton Mills v. Upton, 10 Gray 582;

chinery, to about one-half of its total output, which averaged \$175,000 per year, and ran as high as \$350,000 one year; the firm became insolvent in 1857.

The stock of the corporation was 200 shares of par value of \$500. All the officers of the corporation knew of the existence of the partnership, as did also all the stockholders, except one who owned four shares, and who transferred them in 1854 to another of the stockholders, and who generally relied upon the judgment of his relatives, who were officers and directors.

Mason had contributed only his skill and patent rights. The corporation contributed all the money for the purchase of lands and personal property.

Upon the insolvency of the firm, Mason had filed his petition asking for, and obtained, the institution of insolvency proceedings against the corporation and himself as partners. Thereupon the corporation filed its petition<sup>1</sup> to set aside said proceedings, to restrain the assignee from further interfering with the corporation's estate, and to compel the judge of insolvency to entertain a petition of the corporation for the benefit of the insolvent laws respecting insolvent corporations. It is held that the relief should be granted inasmuch as the proceedings on Mason's petition are illegal and must be set aside so far as they affect the estate of the corporation.

This conclusion is arrived at from substantially the following considerations: The corporation was created for the purpose of manufacturing cotton goods; its charter is the origin and source of its powers and functions. What powers are granted expressly or by implication, because necessary or usual for its purposes, the corporation has, and no more. A corporation differs from a partnership; the act of the former, when done by its vote or by its authorized agent, is the manifestation of its collected will. No member as such can bind it. But in a partnership each member binds the society as a principal. "If, then, this corporation can enter into a partnership with an individual, there would be two principals, the legal person and the natural person, each having within the scope of the society's business full authority to manage its concerns, including even the disposition of its property." This would prevent

<sup>1</sup> In accordance with Ch. 163, Statute of 1838.

its business being managed by its president, directors and other officers,<sup>1</sup> and indeed would prevent the latter from performing nearly all duties made requisite by the various sections of the corporation acts. The power to form a partnership is not among the granted powers and is wholly inconsistent therewith, especially so when the partnership is to carry on a business foreign from that for which the corporation was created.

Clearly, then, the corporation exceeded its express and implied powers, and the contract of partnership was illegal and void. It was urged that only the commonwealth, by proceeding for a forfeiture of the charter, could raise the question of its violation; but it was held that the very basis of Mason's petition in insolvency was the existence of an actual copartnership. "It was not sufficient to show that they had so conducted it as to be liable to third persons as partners; they must be partners *inter sese*." Into such a contract the corporation was incapable of entering. But the case rests on broader grounds. The charter is part of the public law;<sup>2</sup> all who deal with it must take notice of the extent of its powers; its incapacity to enter into the contract was not peculiar to it or its members, but resulted from general grounds of public policy, which policy confines corporations within the limits prescribed by law, to protect the stockholders from liabilities which the charter and laws do not create; and while it imposes heavy responsibilities upon them, it retains to them the legal control of its business and conduct of its affairs. The precise point is the validity of the insolvency proceedings, which must fail because it depended upon the existence of an actual partnership. It is unnecessary to inquire as to the rights or status<sup>4</sup> of credit-

<sup>1</sup> As required by C. 88, Section 2 of the Revised Statutes.

<sup>2</sup> *Hanson v. Paige*, 3 Gray 239.

<sup>3</sup> Rev. Statutes, C. 2, Section 8.

<sup>4</sup> The authorities have a tendency to hold that the corporation would in such case be estopped from denying the partnership; see *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Quincy Canal v. Newcomb*, 7 Met. 276; *White v. South Shore Railroad*, 6 Cush. 412.

A later instance of absence of corporate power: Neither a railroad com-

pany nor a corporation chartered to manufacture musical instruments can be held as guarantors to the expenses of the World's Peace Jubilee and International Musical Festival (1872), although the business of each was to be enhanced thereby. (Exhaustive opinions, reviewing numerous authorities.) *Davis v. Old Colony R. R.*, 131 Mass. 259. For exhaustive review of "ultra vires" see Ch. XL, Cook on Stock and Stockholders, 8d Ed.

ors or debtors of the alleged partnership. Even if all the stockholders had consented—which is not the fact—to the formation of the partnership, it could not enlarge the powers of the corporation, or make that legal which was inconsistent with the law limiting its powers and prescribing its duties. It is not necessary to inquire whether, if such assent were available, it could be manifested in any other mode than the vote of the stockholders; nor need it be inquired whether, if a partnership had existed, the corporation could be subjected to the insolvency acts.

#### SECTION ELEVEN.

**State v. Nebraska Distilling Co., 46 N. W. 155; 29 Neb. 700.**

**“The Whisky Trust”: a corporation has no power to sell its entire property (in furtherance of monopoly).**

*Quo warranto* to obtain a forfeiture of the corporate franchise of the Nebraska Distilling Company. The salient facts found are that the defendant is a corporation organized March 26, 1886, under the laws of Nebraska, for the manufacture of alcohol, spirits and other liquors; duration twenty years; capital \$100,000, of which D. T. Mills & Co. owned 745 shares, George L. Woolsey 250 shares, and five other persons one share each. The defendant's distillery was operated until December 19, 1887, giving employment to some fifty or sixty persons, consuming 600 bushels corn, and producing 2,700 gallons alcohol, etc., per day.

In 1887, prior to December, Joseph B. Greenhut and eight others, owners of sundry distilleries located north and west of the Ohio river, formed an unincorporated association known as and called the “Distillers' & Cattle Feeders' Trust,” having its headquarters at Peoria, Ill., and formed for the purposes of restricting the output of, regulating and fixing prices for, and preventing competition in alcohol, high wines, etc. The method is as follows: As many distilleries as possible are brought under control; the trust has nine trustees; the shares of stock of each individual corporation is canceled and new

stock for same is issued to these trustees and they return for the same to the former stockholder an equivalent amount in certificates of trust; the directors resign, and a new board is elected, a majority of whom are taken from said nine trustees. The real estate of each corporation is deeded to an individual as trustee for the stockholders, and he leases it to the company for a term of twenty-five years.

"Pools" had formerly been attempted by the distilleries having the purpose of preventing production and competition and low and unprofitable prices. These "pools" were inefficient; but out of from ninety to one hundred and ten distilleries located north and west of the Ohio, some seventy-five to eighty joined in the trust, and of these only about fourteen are kept running; and of these six are at Peoria. The trust is found amply efficient in producing and does produce all the results which are contemplated.

Defendant's distillery was brought into the trust in the manner aforesaid, in December, 1887; the company continued to do business until July 1, 1888, at which time by order and direction of the trustees it was closed and wholly ceased to do any business.

January 15, 1890, all the stock being represented, the directors and stockholders of the defendant met at Peoria and passed resolutions empowering the directors to sell all its property, to cancel and surrender all its stock, to dissolve the corporation, and to notify the Secretary of State of Nebraska to that effect. Sale was accordingly made; the purchaser soon thereafter sold the property to one Woolsey, formerly a director of the defendant, and he entered into a condition not to use such property for distilling purposes during the period of said lease.

Said Distillers' & Cattle Feeders' Trust became incorporated under the laws of the State of Illinois in February, 1890, with a capital stock of \$35,000,000.

The Willow Springs Distilling Company has also entered the trust. This company and the defendant were the only distilling companies in Nebraska. The defendant is about to be, as a considerable number of others in the trust have been, dismantled and rendered worthless as distilleries.

When all the distilleries north and west of the Ohio are



run to their full capacity, there is such an over-production as to cause a loss in their operation.

The defendant yielded a large profit prior to the time it was placed under the trust; a fact from which it would be reasonable to conclude that it might have continued to run under like circumstances with like result.

Under statute and by common law, corporations can be organized for, and transact, only lawful business. Any act done for the accomplishment of any unlawful purpose is in excess of its powers, and is illegal and void. To be unlawful, corporate acts need not necessarily be *mala in se*, or *mala prohibita*. Any corporate act not authorized by the terms of the charter is outside of the corporate powers and illegal.

Contracts in total restraint of trade are void, no matter what the consideration may be, because the effect thereof must be injurious to the public.<sup>1</sup> Before such a contract can be enforced it must appear from the pleadings and proofs that the restraint is only partial; that it is reasonable and founded on good consideration,<sup>2</sup> and this seems to be the law at the present time.<sup>3</sup> Whatever tends to destroy competition and create monopoly is contrary to public policy, and therefore unlawful.<sup>4</sup> On this theory, the "Diamond Match Company" trust was held unlawful by the court, upon its own motion, taking notice of its illegality.<sup>5</sup> Public policy favors competition, and is opposed to monopolies tending to advance market prices to the injury of the consumer.<sup>6</sup> Articles of incorporation being entered into *ex parte* by the interested persons, and assuming often most extensive powers, are not entitled to any very lib-

<sup>1</sup> *Mitchel v. Reynolds*, 1 P. Wms. 181 (1711); *Homer v. Ashford*, 8 Bing. 322; *Horner v. Graves*, 7 Bing. 735; *Hayward v. Young*, 3 Chit. 407.

<sup>2</sup> *Lange v. Werk*, 2 Ohio St. 520.

<sup>3</sup> *Lawrence v. Kidder*, 10 Barb. 641; *Pierce v. Fuller*, 8 Mass. 233; *Palmer v. Stebbins*, 3 Pick. 188; *Whitney v. Slayton*, 40 Me. 231; *Nobles v. Bates*, 7 Cow. 307; *Duffy v. Shockey*, 11 Ind. 71; *Bowser v. Bliss*, 7 Blackf. 344; *Beard v. Dennis*, 6 Ind. 204; *Chappel v. Brockway*, 21 Wend. 158.

<sup>4</sup> *Morris Penn. Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Craft v. McConoughy*, 79 Ill. 346; *Railroad Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Railroad Co.*, 43 Ga. 13; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600; *People v. Trust Co.*, 22 N. E. Rep. 793; *Richardson v. Buhl*, 43 N. W. Rep. 1102; *Richardson v. Buhl*, 43 N. W. Rep. 1102.

<sup>5</sup> *Salt Co. v. Guthrie*, 30 Ohio St. 666.



eral construction.<sup>1</sup> A corporation can exercise no powers except such as are granted to it by the charter under which it exists.<sup>2</sup> Alcohol is an article of commerce; it is applied to a thousand uses in arts and manufactures; but a very small part goes into intoxicating drinks; hence, being an article of commerce, any contract creating a monopoly therein is against public policy and void.

It is no part of the powers of the distilling company to sell all its property, real and personal, together with the franchises and powers necessary to properly carry on the business.<sup>3</sup>

The fact that it may lawfully put an end to its existence by vote of a majority of its stockholders, in which event it may settle its affairs, dispose of its property and divide its capital stock, and surrender its charter to the State, does not authorize it to terminate its existence by sale and disposal of all its property and rights.<sup>4</sup>

The object of the trust is clearly shown to have been illegal as destroying competition and creating a most offensive monopoly, not only by limiting the product, but also by dismantling as many distilleries as the trust saw fit, absolutely preventing the manufacture, excepting in a few controlled by the

<sup>1</sup> Oregon R. & N. Co. v. Oregonian Ry. Co., 130 U. S. 1; S. C., 9 S. C. R. 409.

<sup>2</sup> Thomas v. Railroad Co., 101 U. S. 71; Oregon R. & N. Co. v. Oregonian Ry. Co., 130 U. S. 1; S. C., 9 S. C. R. 409.

<sup>3</sup> Oregon R. & N. Co. v. Oregonian Ry. Co., 130 U. S. 1; S. C., 9 S. C. R. 409.

<sup>4</sup> Oregon R. & N. Co., v. Oregonian Ry. Co., 130 U. S. 1; S. C., 9 S. C. R. 409. A rather shadowy distinction, is it not? To say that a corporation *may* vote to dissolve and may then sell out and divide the proceeds? But it *can not* first sell out and divide up and then vote to dissolve. Nor is there anything in the *sole* case cited to sustain it. That case, Oregon, etc., v. Oregonian, etc., which see else-

where in this book, relates to a public carrier's inability to absolve itself from its duty to the public by leasing its road to another, and hence, to its disability to lease. Presumptuous, indeed, were it to question the correctness of the general results reached by the court; but, nevertheless, it is unfortunate that the decision of the real question in the case is not made firmer by reason or authority. That question is, whether a mere manufacturing corporation (having no public nor *quasi* public privileges or duties, as, for instance, a railroad company's right of eminent domain and duty to carry all who apply) can be prevented from selling its plant, merely because the purchaser intends to withdraw it from usefulness.

trust; thus controlling prices; hence any contract entered into with such purpose in view is null and void; such contract was the original conveyance by the defendant of its real and personal property, and no title passed thereunder.

Since this suit was commenced the trust has endeavored to further transfer the property and dismantle it; if successful in this it will have accomplished its illegal purpose. The court, having the property in its jurisdiction, will not allow this to be done, but will make such disposition of the property as the ends of justice may require.

As there has been an abuse of the corporate franchise it will be dissolved and annulled.

Further argument will be entertained as to the disposition of the property and the rights of Woolsey. The act of 1889 in relation to trusts has not been referred to; its application to the case will be further considered.

**“The Whisky Trust” in Illinois: corporate guise can not be used to accumulate property for purposes other than their industrial uses.**

This combination was assailed in Illinois in 1894, upon *quo warranto* by the attorney-general in the Circuit Court of Cook County; the information recited, in its leading features, the formation by various corporations of a trust, by which these corporations placed all their plants in the hands of nine trustees, who practically controlled all the plants, operating or shutting them down as they deemed best; this combination ultimately absorbed eighty-one different distilleries, and then formed itself into a corporation in which the nine trustees constituted the stockholders; eventually this corporation controlled and monopolized, practically, the entire product of the United States in highwines, spirits and alcohol, operated or dismantled the distilleries as it pleased, raised prices, dictated terms, etc.

On these, and other facts shown by the various trust agreements, books and records, the court concludes that the corporation was formed and carried on for the purpose of creating and maintaining a monopoly, and judgment of ouster and dissolution was passed against it in the circuit court, and affirmed in the supreme court.<sup>1</sup>

<sup>1</sup> Distilling & Cattle Feeding Co. v. People, 156 Ill. 448.

There was litigation at the time pending in the United States Circuit Court at Chicago, in which some of the beneficiaries under the trust had placed the property of the corporation in the hands of receivers; hence, when the supreme court of the state affirmed the judgment of ouster, the federal court ordered all the property (capitalized at \$35,000,000) to be sold by the receivers, which they did, and obtained \$9,800,000 for the same from a reorganization of some of the beneficiaries.

The decision in the supreme court, when dealing with the merits of the controversy says, among other things, that the trust was designed to be and was in fact a combination in restraint of trade, organized to stifle competition and create a monopoly. "The trust obtained possession of nearly all the distilleries and of nearly the entire distillery product of the United States, thus enabling it to dictate prices and the amount of production, and to thus draw to itself the substantial control of the distillery business of the country."

The court, after reviewing the authorities, takes up the question whether this, being a corporation, and having bought, in its corporate capacity, all these properties, does not become the owner thereof and can do with the same as it may please, as could the individual owner; and that there is no limit placed upon the amount of property which this corporation could buy.

To this the court responds, in substance, that the corporate machinery was merely colorable, and to effectuate the illegal purpose of monopoly, and that in law the defendant, though a corporation, *is limited* in the amount of property which it may acquire. "The defendant is authorized to own such property as is necessary for carrying on its distillery business and no more." "It has no power by its charter to enter upon a scheme of getting into its hands and under its control all, or substantially all, the distillery plants and the distillery business of the country, for the purpose of controlling production and prices, of crushing out competition, and of establishing a virtual monopoly in that business. Such purposes are foreign to the powers granted by the charter." The acquisitions were not for the purpose of carrying on the distillery business, hence, were illegal, and the corporation having usurped pow-

ers not belonging to it, rendered itself liable to judgment of ouster.

### SECTION TWELVE.

**Richardson v. Buhl, 43 N. W. 1102; 77 Mich. 682.**

**“The Match Trust” condemned: the courts will not enforce contracts in furtherance of monopoly in corporate guise.**

Bill by Richardson to recover money paid to Buhl and Alger under a contract. Decree for plaintiff; reversed in the Supreme Court.

In 1879 plaintiff owned or controlled all of the stock of the Richardson Match Company, a Michigan corporation, whose business was manufacturing matches. It had not been in operation for sixteen months previous to July 3, 1879. Capital stock was \$75,000; shares \$25 each. Defendants became surety for plaintiff and said corporation on sundry obligations, and on July 3, 1879, received from him 1,800 shares of the stock, they to have the right to vote the same, and to have five-sixths of all dividends thereon; and they to return the same when all said obligations have been paid. The defendants became officers of the company; the company was thus conducted until December 24, 1880.

The Diamond Match Company was organized under the laws of Connecticut, December 3, 1880, for the purpose of uniting in one corporation all the match manufactories in the United States; its object was to monopolize the business of making matches. It became necessary to buy many plants and put the owners under restriction not to engage in the business for ten years. For this purpose large powers were given it by the legislature and under the by-laws by which it was controlled; extent to which it was allowed to go in this direction in the accomplishment of its purpose appears in the articles of incorporation, stating, among other things, its business to be “to manufacture, buy, sell and deal in friction matches of all kinds and all articles entering into the composition and manufacture thereof; to manufacture, buy, sell and deal in machines and machinery, whether applicable to the manufacture of friction

matches or to other purposes;" also patents and patent rights, and rights under patents; also real and personal property for above purposes could be bought and sold.<sup>1</sup>

The plan of operation was that the Diamond Match Company bought as many plants of other corporations as it could, paying the owners thereof in stock of the Diamond Match Company, and placing them under conditions and bonds not to re-engage in the business.

Substantially all of the factories in the country were thus bought in; the monopoly became complete and its profits enormous; each plant bought was estimated at a high price, for the double purpose of inducing the owner to come into the monopoly, and of placing an enhanced figure upon the capital stock of the latter. The plants bought were paid for in part with common and in part with preferred stock of the Diamond Match Company, but the vendor had to pay cash for a certain proportion of the preferred stock; this cash furnished the Diamond Match Company its working capital.

Richardson's corporation sold its plant to the said company, and Buhl and Alger aided him in raising said cash amount. Extensive contracts were drawn between the parties in relation to the proportion in which they were to divide the profits and dividends which should be received from the new company. It is upon a construction of the ambiguous terms of these contracts that the cause was heard; the court below solved them in favor of Richardson, and decreed that a large sum was accordingly due to him from defendants.

This decree is reversed by the Supreme Court; the contracts are somewhat reviewed, and intimations are made that the defendant's view of the construction thereof should prevail.

The decision, however, is put upon another ground. The court of its own motion asserts that the entire plan of the corporations, and all the various contracts of the individuals involved in the matter were knowingly entered into for the purpose of creating a monopoly in matches. The counsel for

<sup>1</sup> It is difficult to see how these articles of incorporation manifest any unusual power or scope looking toward the creation of a monopoly. All manufacturing companies have similar provisions; excepting perhaps, the power as to machinery, which may be applicable to other purposes than making matches.

the contending parties had not raised the question, on the contrary, both sides expressed the desire that the contracts should be deemed valid and that the decision should be on their construction. But the opinion (by Sherwood, C. J.,) is that no one can fail to discover in the matter that considerations of public policy are clearly involved. The monopoly is openly and boldly avowed. The organization makes provision for an enormous capital, sufficient to absorb the entire match industry of the United States and Canada; its sole object is to make money by raising prices and restricting the output. Thus to satisfy the cupidity and avarice of some six individuals, 60,000,000 people, for the next fifty years, may be affected. No other article affects so many. Monopoly is sometimes permitted as a governmental necessity; it is then in the interest of the public and under governmental control; but at all other times is odious; it is destructive to our free institutions and repugnant to the instincts of a free people; contrary to the whole scope and spirit of the federal constitution and forbidden by express provision in several state constitutions. Indeed, it is doubtful if free government could long exist in a country where such enormous amounts of money are accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interests of the public and that of the people for the personal gain and aggrandizement of a few individuals. It is destructive of individual rights and of free competition, of individual enterprise and prosperity; and whether conferred upon, or made use of by, individuals or corporations, all combinations having the purpose to raise or control the prices of merchandise or other necessities are intolerable monopolies and should receive the condemnation of all courts. The Diamond Match Company is engaged in an unlawful enterprise; the contracts sued upon being in furtherance thereof are null and void; and the bill should be dismissed.

Champlin, J., concurs: Large sums of money were used in buying up the various plants, greatly in excess of what they are worth; this was done to stop competition. These sums were called expense, and were recouped by keeping up the price of matches.

All the parties to the suit joined in this enterprise which seeks to engross and control the entire match business; such a vast combination is a menace to the public. It is no answer to say that it has in fact reduced the price of matches; this may have been necessary to crush competition; it may in its discretion at any time again raise them to an exorbitant degree. Such combinations have frequently been condemned as unlawful and against public policy.<sup>1</sup> And it is well settled that if a contract be void as against public policy, the court will neither enforce it while executory nor relieve a party from loss by having performed it in part.<sup>2</sup> And this course the court will take on its own motion.

Campbell, J., concurs with Champlin, J.

Long, J., concurs in the result because he finds the construction of the contracts to be as claimed by defendants and finds that they have treated the plaintiff fairly and honorably throughout. He says no question of public policy is involved; defendants were at no time members of or stockholders in the Diamond Match Company; reference to it and its operations were solely for the purpose of fixing the basis of accounting between plaintiff and defendants as to the former's stock held as security by them.

<sup>1</sup> Hooker v. Vandewater, 4 Denio 849; Stanton v. Allen, 5 Denio 434; Coal Co. v. Coal Co., 68 Pa. St. 186; Salt Co. v. Guthrie, 35 Ohio St. 672; Craft v. McConoughy, 79 Ill. 346; Hoffman v. Brooks, 11 Week. Cin. Law Bul. 258; Hannah v. Fife, 27 Mich. 172; Alger v. Thacher, 19 Pick. 51.

For general discussions of monopolies and contracts in restraint of trade see recent important cases with valuable and exhausted notes: People v. Trust Co. (Ill.), 22 N. E. R. 798 and note; Carroll v. Giles (S. C.), 9 S. E. R. 422 and note; Telegraph Co. v. Railroad Co., 11 Fed. Rep. 1; Car Co.

v. Railway Co., Id. 625; Sharp v. Whiteside, 19 Fed. Rep. 156; Dolph v. Machinery Co., 28 Fed. Rep. 553 and note; Lumber Co. v. Hayes (Cal.), 18 Pac. Rep. 391 and note; Coke Co. v. Coke Co. (Ill.), 13 N. E. R. 169; French v. Parker (R. I.), 14 Atl. Rep. 870; People v. Refining Co., 8 N. Y. Supp. 401; People v. Milk Exchange, 39 N. E. R. 1063 (N. Y.), dissolving the "Milk Trust."

<sup>2</sup> Foote v. Emerson, 10 Vt. 344; Hanson v. Power, 8 Dana, 91; Pratt v. Adams, 7 Paige 616; Piatt v. Oliver, 1 McLean 300; 2 McLean 277; Stanton v. Allen, 5 Denio 434.



## SECTION THIRTEEN.

**Strait v. National Harrow Co., 18 N. Y. Supp. 224.**

**“The Harrow Tooth Trust”: corporate industry may not be restricted to certain patents.**

Contract between a firm and a corporation and others combining all the harrow tooth manufacturers for the purpose of monopolizing the trade therein is held illegal and is set aside upon complaint of said firm.

The contract undertakes to prevent the plaintiffs from manufacturing for fifty years any harrow tooth except under the patents now owned by them, and defendant is not to manufacture for fifty years under these patents; and defendant has the absolute power to fix the prices; the prices may now be low, but defendant has power to raise them at will. “It is hard to conceive how a monopoly may be more firmly entrenched or how competition could be more effectively strangled.”<sup>1</sup> The mischief is not the raising of the price, but the power to raise it,<sup>2</sup> or to remove prices beyond the operation of their natural cause of fluctuation.<sup>3</sup> The rule as to contracts in restraint of trade has been considerably relaxed,<sup>4</sup> but courts

<sup>1</sup> *People v. Refining Co.*, 7 N. Y. Supp. 406.

<sup>2</sup> *Dolph v. Machinery Co.*, 28 Fed. Rep. 553; *Butchers, etc., v. Crescent City*, 111 U. S. 755; 4 Sc. R. 652.

<sup>3</sup> *Hoffman v. Brooks*, 11 W'kly Law Bull. 258-259; see *Carbon Co. v. McMillin*, 6 N. Y. Supp. 488; 119 N. Y. 46; 23 N. E. R. 530; *Hooker v. Vandewater*, 4 Denio 349; *Stanton v. Allen*, 5 Denio 434; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 186; *Salt Co. v. Guthrie*, 35 Ohio St. 672; *Craft v. McConoughy*, 79 Ill. 346; *Arnot v. Coal Co.*, 68 N. Y. 558.

<sup>4</sup> *Diamond Match Co. v. Roeber*, 106 N. Y. 478; 13 N. E. R. 419.

See also opinions by McGill, chancellor, in *Stockton, Att'y Gen'l, v. Central Railroad Co. of New Jersey et al.*, “The Reading Coal Trust,” 24 Atlantic Reporter 964, enjoining the illegal combination of railroads and coal dealers, and 25 Atlantic 942, refusing a receiver because it appears none is needed, the injunction being now obeyed.

This opinion (24 Atl. 964) is almost a complete treatise on such questions as, powers of corporations, right to lease franchise, and the people's right in equity to restrain monopolies.



have in no case sanctioned a general combination to engross the market, control prices and prevent competition. This is indictable at common law and by statute. "Nor can the defendant shield itself under its corporate rights. When the fact appears that the forms of law are being used to accomplish a legal wrong a court of equity is potent to relieve a suitor and if necessary to rend asunder the legal veil which covers the iniquity."

#### SECTION FOURTEEN.

##### Same parties.

**Whether question as to illegal combination can be collaterally raised ?**

Suit between the same parties in Federal Court.<sup>1</sup> Strait asks for an injunction to restrain actions by defendant, National Harrow Company, for infringement of patents. Demurrer to bill sustained.

Opinion by WALLACE C. J. The question of defendant's illegal combination can not be raised in an action brought by it for infringement of patents, nor in a suit brought to enjoin such actions; though it might be, were the action brought to enforce the combination itself or any right growing out of it. Such inquiry is as impertinent in a suit brought for infringement of patent as would be an inquiry into the moral character or an-

<sup>1</sup> Strait v. National Harrow Co., 51 Fed. Rep. 819.

Brick monopoly: an association has no standing in court as a partnership, to sue for value of goods sold and delivered; the defense can be raised by answer, issue being made by replication. Jackson v. Akron Brick Ass'n (Supreme, Ohio), 41 N. E. R. 257.

The American Preservers' Company is allowed a standing in court (though it be an illegal combination), in a replevin suit (Bishop v. Am. P. Co., 51

Ill. App. 417), but this decision is said to have been reversed in the Supreme Court (not yet officially reported).

Although a combination to monopolize the beer trade is not illegal at common law (beer not being an article of prime necessity), yet it is illegal under the Texas act of 1889, relating to all commodities; still the purchaser can not set up the illegal combination in defense of an action for the beer by him bought. Anheuser v. Houck (Tex.), 27 S. W. R. 692.

precedents of plaintiff in an ordinary suit for trespass upon his property.<sup>1</sup>

### SECTION FIFTEEN.

**State v. Standard Oil Co., 49 Ohio 187; 80 N. E. 279.**

**"The Standard Oil Trust": the constituent corporation will be ordered to withdraw from the combination.**

*Quo warranto* by the State of Ohio, through its attorney-general, against the Standard Oil Company; purpose of which was to oust the defendant of the right to be a corporation, on the ground that it had abused its corporate franchises by becoming party to an agreement that is against public policy.

Substance of the objectionable agreement, so far as here material, was as follows: The defendant, Standard Oil Company, was incorporated in Ohio, its purpose "the manufacture of petroleum and to deal in petroleum and its products, capital \$1,000,000, raised to \$2,500,000 and then to \$3,500,000. The corporate name was not signed to the agreement, but all the stockholders did sign it. Seven shares of the stock were transferred to the directors, all the remaining shares, \$84,993, to the nine trustees selected to manage the trust; the stockholders received trust certificates in their place. The number of directors was reduced from seven to five. The nine trustees choose the defendant's directors and thus control the action of the defendant in the conduct and management of its business. Defendant's president is president of said board of nine trustees, and some of its directors are members of said board. Defend-

<sup>1</sup>See *contra*, same company v. Schlegel, 22 N. Y. Supp. 407; affirmed Quick, 67 Fed. R. 130. The authori- 88 N. E. R. 729. But Ford v. The ties are not harmonious upon the Chicago Milk Shippers' Association, question of collaterally assailing the 155 Ill. 166, denies to a corporation character of the combination or cor- (which is shown to have been con- poration. A corporation appearing ducted as and for an illegal monop- to be chartered in Illinois for a legal oly) the right to recover the price of purpose. may, in New York, enforce milk sold to a stockholder in pursu- its stock subscriptions, and the de- ance of such monopoly. This decis- fendant will not be allowed to show ion reverses same case in 46 Ill. App. that it was in fact formed to create a 576. monopoly. U. S. Vinegar Co. v.

ant has not, as a corporation, taken any action or made any complaint against any of these proceedings; nor have any of the officers, directors or stockholders done so.

There are a large number of other corporations in the United States whose stock and management are held by said trustees under the same agreement and in the same manner, their stockholders having exchanged their stock for said trust certificates; no stockholder receives dividends based on the earnings of his own company, but all the earnings of all the companies are received by the trustees and divided to the holders of the trust certificates. All these various companies agreed that new corporations should be formed in Ohio, New York, Pennsylvania and New Jersey, or existing charters could be used. The purpose of such corporations to be to mine for, produce, manufacture, refine and deal in petroleum and all its products, and all the materials used in such business, and to transact other business collateral thereto. The name of each corporation shall be "Standard Oil Company of ——" (here follows the name of the state or territory by virtue of the laws of which it shall be organized. All of the property, real and personal, assets and business of each and all of the constituent companies is to be transferred to and vested in the Standard Oil Company of the particular state wherein the constituent companies are. The trustees may also buy bonds or stocks of other companies engaged in a similar or collateral business. The annual meetings of the holders of the trust certificates for the election of trustees were to be held in New York. The principal offices of the trustees shall be in New York. The trust is to continue during the lives of the survivors, and survivor of the trustees in this agreement named and for twenty-one years thereafter. Provision was made for earlier termination on vote of a certain proportion of the stock. A subsequent agreement placed it in the power of the trustees to determine which companies should convey their property to the trustees, and when, and also which should remain in existence and continue in business and have only its stock conveyed to the trustees.

On these facts the court decides that the defendant, Standard Oil Company, must be regarded as having in its corporate capacity entered into the agreement. True, its corporate name

is nowhere used in connection therewith, and it has a corporate existence and entity distinct from that of its stockholders; such entity is, however, only a legal fiction, and when urged to an injurious end will be ignored, and it will be determined whether the act in question, though done by the stockholders—that is to say by the persons uniting in one body—was done simply as individuals, and with respect to their individual interests as stockholders, or was done ostensibly as such, but as a matter of fact, to control the corporation, and affect the transaction in the same manner as though it had been a corporate act. The court considers in detail the extended agreements referred to and concludes that they were undoubtedly in their purpose and intent, and even in the terms used, acts done for the corporate purpose and in the corporate capacity, as fully as if avowedly so done in the corporate name, though concealed in the guise of individual acts; and to prevent the abuse of corporate power may be challenged by *quo warranto* as an act of the corporation.

The nature of the agreement is such as to preclude the defendant from becoming a party to it; if it constitutes a partnership between the various constituent corporations and firms it is clear that it must subject the defendant to a control inconsistent with its character as a corporation. The law requires that a corporation should be managed in the interests of its stockholders and conformably to the purpose for which it was created by the laws of the state; but by this agreement it would be controlled by an association having its principal place of business in New York and formed for a purpose contrary to the policy of our laws; its object being to establish a monopoly, and to control the production and prices. Such associations are contrary to our policy and void,<sup>1</sup> although it may have in its operations improved the quality and cheapened prices. “But such is not one of the useful or general results of a monopoly; and it is the policy of the law to regard not what may, but what usually, happens. Experience shows that it is not wise to trust human cupidity where it may aggrandize itself at the expense of others.” This same view

<sup>1</sup> Salt Co. v. Guthrie, 35 Ohio St. 666; Emery v. Candle Co., 47 Ohio St. 320; 24 N. E. R. 660.

is taken in the Diamond Match case.<sup>1</sup> Monopolies have always been regarded as contrary to the spirit and policy of the common law; because, as it is said,<sup>2</sup> “(1.) The price of the same commodity will be raised, for he who has the sole selling of any commodity may well make the price as he pleases. (2.) After a monopoly is granted the commodity is not so good and merchantable as before; for the patentee having the sole trade regards only his private benefit and not the commonwealth. (3.) It tends to the impoverishment of divers artificers and others, who before, by the labor of their hands in their art or trade, had maintained themselves and their families, who will now of necessity be constrained to live in idleness and beggary.” It is not desirable to have a few men employers and the great body merely servants; it should be as much the policy of the law to multiply the number engaged in independent pursuits or in the profits of production as to cheapen the price to the consumer. This would tend to equalize fortunes, thought so desirable in a republic, and to lessen pauperism and crime. Whether a monopoly is created by letters patent, or by an extensive combination among those engaged in similar industries, controlled under one management, the effect will be the same. “By the invariable laws of human nature competition will be excluded and prices controlled in the interest of those connected with the combination or trust.”

The relief prayed of ousting the defendant from its corporate existence can not be granted; it is barred by the statute which limits actions for forfeiture of charter to five years after the act complained of was done or committed.<sup>3</sup> But there is a prayer for other relief, and while the statute does not allow actions against a corporation for the exercise of a power or franchise under its charter which it has used and exercised for a term of twenty years, it follows that within that twenty years such action will lie. Hence judgment is given that defendant be ousted “from the power to make and perform” said agreement or any part of it; and should the defendant hereafter still do any act provided for in said agreement it would be held as doing so in violation of this judgment.

<sup>1</sup> Richardson v. Buhl, 77 Mich. 632; 43 N. W. Rep. 1102.

<sup>2</sup> The “Case on Monopolies,” Darcy v. Allein, Coke, Pt. 11, 84 b.

<sup>3</sup> Revised Statutes, 6789.

## SECTION SIXTEEN.

**United States v. Jellico Mountain Coal & Coke Co., 46 Fed. 482.**

**A coal trust is enjoined as contrary to the Sherman Law.**

Under the Federal statute of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," there is a jurisdiction under section 4 in the name of the United States as complainant, to prevent by injunction the continuance of any combination or contract or trust or conspiracy in restraint of commerce among the several states. This remedy is given, although there is also the remedy of punishing such offenses as misdemeanors. The questions are raised that the Federal courts have jurisdiction only of controversies between citizens of different states, and that this is not such a controversy; and it is also claimed that the defendants are entitled to a trial by jury for the supposed offense and should not be subjected to a suit in equity, and hence, it is urged that the act is unconstitutional. The court, however, on the principle that all acts of Congress should be deemed, certainly by the lower courts, constitutional unless the contrary be shown by clear and undeniable reasons, holds that enough has been made to appear from the discussions of numerous authorities *pro* and *con* to prevent it from holding the act unconstitutional. The contract in question, further performance of which was thus stayed by injunction, was between coal mining companies operating chiefly in Kentucky, and coal dealers in Nashville, Tennessee, and leading features of the same provided for establishing prices, changing same from time to time, and dividing the advance between the mine owner and the dealer, fixing penalties for its violation, preventing the mine owners from selling to others than these dealers, and preventing the latter from buying elsewhere. This contract is illegal under several parts of the act, and more especially because it is an attempt to monopolize or combine commerce between the States.

## SECTION SEVENTEEN.

**Oliver v. Gilmore, 52 Fed. Rep. 562.**

**Contract, limiting manufacture of hinges, held void; principles and their limitations clearly and succinctly stated.**

Brief but comprehensive opinion by Putnam, Circuit Judge.

While recognizing the distinction between corporations owing a public duty (*e. g.* carriers) and corporations of a purely private nature (*e. g.* manufacturing concerns), yet the latter are also not allowed an unlimited scope in contracting. They stand in this respect, however, on the plane of individuals, and may enter into any combination which the latter could enter into.

This contract, requiring one factory to cease operations, receiving a monetary consideration for so doing, and requiring the other not to increase its capacity, will not be upheld. Although the rules as to restraint of trade are not so narrowly drawn as formerly, yet all the enlargement now permitted can be attributed to one or more of the following principles (under none of which falls the contract in question): *First.* Closing no establishment; withdrawing no person from his trade or profession, although such results may incidentally follow, but rather apportioning labor and being thus of advantage.<sup>1</sup> *Second.* Engaging upon new enterprises, which parties would not do excepting upon their own conditions.<sup>2</sup> *Third.* Conditions under which persons enter the employment of manufacturers or dealers.<sup>3</sup> *Fourth.* Enlarging the limit within which, for proper reasons, a party may bar himself from pursuing his trade or profession.<sup>4</sup> The good will of a

<sup>1</sup> Such are *Collins v. Locke, L. R.*, 4 App. Cas. 674; *Machinery Co. v. Dolph*, 138 U. S. 617; 11 S. C. R. 412; 28 Fed. Rep. 553.

<sup>2</sup> Such as *Fowle v. Park*, 131 U. S. 88; 9 S. C. R. 658; *Cloth Co. v. Lonsont, L. R.*, 9 Eq. 345.

<sup>3</sup> Illustrated by *Rousillon v. Rousillon*, 14 Ch. Div. 351.

<sup>4</sup> Reviewing *Mitchel v. Reynolds*, 1 P. Williams 181 (A. D. 1711); *Navigation Co. v. Winsor*, 20 Wall. 64.

business may now be national and even international, and the purchaser, in order to pay the best price, may require for his protection a national or international restriction; this also enables the seller to receive the best price.

In none of these is trade in general diminished; there is merely a substitution of one person for another in the particular enterprise.

Not so, however, with the contract under discussion. Its tendency is to destroy the usefulness of property; to deprive the country of an industrial agency; to require the transfer of residence or allegiance, and to cause a cessation or diminution of business.

*Prima facie* the contract is illegal; still, as it should be judged upon its reasonableness under all its circumstances,<sup>1</sup> the demurrer to the declaration is sustained, but with leave to plaintiff to amend in order to set out the facts and to obtain an opportunity to recover the money paid under the contract.

<sup>1</sup>Gibbs v. Gas Co., 130 U. S. 396, 409; 9 S. C. R. 553; Fowle v. Park, 131 U. S. 88; 9 S. C. R. 653.



## CHAPTER V.

## CONSOLIDATION PROCEEDINGS HELD SUFFICIENT.

The proceedings in consolidation, though technically defective in form, may be deemed cured by acquiescence; especially when the consolidation is in fact actual and complete in all respects, by the practical union and joint operation of the constituent properties.

When the statute permits consolidation with reference to the laws of another state the proceedings, if in accordance with such law, are valid, although in the absence of such law they would be invalid in the state which gives the permission.

A fund may revert to the benefit of those who accumulated it; they being regarded as tenants in common thereof, although they could not assert their right to it as a consolidation, their steps toward forming one having been illegal.

Rights vesting upon the strength of a consolidation having taken place are to be protected, even if the proceedings were illegal, when such proceedings had been acquiesced in and the parties who should have made timely objection failed to do so.

Defective consolidation may be cured also by the acquiescence of the parties, who should have objected, taken together with legislative recognition of the consolidation; such recognition precludes all inquiry into the validity of its origin.

Consolidations may be made from other corporations which are themselves the result of prior consolidations.

Consolidation is proven by the certificate of the secretary of state, which, in some cases, is made conclusive evidence of the sufficiency of the proceedings.

Acquiescing stockholders are estopped from pleading defects in the consolidation, when sued by its creditors.

The depositing of the articles of consolidation with the secretary of state may suffice, though they were not filed; the corporate capacity of the consolidation is derived from the charter powers of the constituents, and being created by the execution of the agreement, exists before the filing of the articles of consolidation.

Right to consolidate may be construed to embrace street railroad companies.

The stockholders only can object to the absence of their own written consent when that is requisite; consolidation laws are to be liberally construed; the plea of *ultra vires* is not favored.

### SECTION ONE.

**Williams v. New Jersey Southern R. R. Co., 26 N. J. Eq. 398.**

**Defects in forms in effecting consolidation are cured by acquiescence.**

Bill by mortgagees to recover corporate stock which had been included in the mortgage, but which defendants fraudulently transferred. The bill seeks to set aside its transfer, and relief is granted. Question chiefly considered is that the mortgage was good upon the stock although not recorded as a chattel mortgage.

The following is the opinion in full:

**THE CHANCELLOR.** The demurrer presents the following questions:

1. Whether the company, now known as the New Jersey Southern Railroad Company (formerly as the Raritan and Delaware Bay Railroad Company) had power, when the mortgage of the complainant was executed, to mortgage personal property not then owned by them, but which they might afterward acquire.

2. Whether, if the mortgage covers the stock of the Long Branch and Sea Shore Railroad Company, it is not necessary to its validity, as to that property, that it should have been filed in accordance with the provisions of the "Act concerning chattel mortgages." By act of the legislature, approved March 17, 1854 (pamph. L. 1854, p. 530), the Raritan and Delaware Bay Railroad Company was authorized to mortgage their road, lands, personal property, privileges, franchises and appurtenances.

Under the power they executed a mortgage which was foreclosed, and their railroad and all their real and personal estate and franchises were purchased by Benjamin Williamson and

George N. Titus, who afterward, under the provisions of the "Act concerning the sale of railroads, canals, turnpikes, and plank roads," (Nix. Dig. 791) with their associates, became a new body corporate and politic by the name of the mortgagors, The Raritan and Delaware Bay Railroad Company, and by virtue of the provisions of that act, became entitled to all the rights, liberties, privileges and franchises of the original corporation, among which was the power of mortgaging their property, given by the act of 1854. In the exercise of this power they executed the mortgage in suit, which was given upon all the real and personal property of the corporation then held, or acquired, or thereafter to be held or acquired, for use in the connection with its road, and its branches, or any part thereof, or with the business thereof.

The mortgage contains a covenant for further assurance, under the mortgage, of all the property and things mortgaged or intended to be mortgaged. The mortgagors (the name of their corporation then being The New Jersey Southern Railroad Company), subsequently to the execution of the mortgage, acquired the railroad, and its appurtenances, of The Long Branch and Sea Shore Railroad Company.

For the purpose of acquiring them, and as the means of consolidating the road and property of the latter company with theirs, they purchased capital stock of that company to the extent of sixteen-seventeenths of the whole amount. The bill states that the demurrant, being the president of the mortgagors (then the Southern company), on the false and fraudulent pretense that the mortgagors were indebted to him, took that stock into his possession, pretending to take it as collateral security for indebtedness of the Southern company to him, and fraudulently caused it to be sold at auction, and bought it in himself, through his agents. The bill seeks relief against him accordingly. The mortgagors had the right, and possessed the power, to acquire the stock in question. By the 5th section of a supplement (approved February 16th, 1870), to the act of incorporation of the Raritan and Delaware Bay Railroad Company (pamph. L. 1870, p. 232) they were authorized and empowered to unite with such company or companies as were or might be incorporated by this state, whose railroad or railroads, or branches, might connect with the railroad or branches of the mortgagors; and, to that end, with the consent of two-

thirds of their own stockholders and the same proportion of the company or companies with which they should propose to unite, to consolidate the capital stock of such company or companies with their own, the assent of the stockholders to the consolidation to be certified to the satisfaction of the governor, and filed in the secretary of state's office.

By a supplement approved February 16, 1870 (pamph. L. 1870, p. 228), to the act of incorporation of the Sea Shore company, power was given to that company and the mortgagors, to consolidate their respective capital stocks on the like terms with those provided in the above mentioned 5th section of the supplement to the charter of the mortgagors. By the 3d section it was provided that the mortgagors might, in lieu of such consolidation, purchase the stock of the Sea Shore company, or might purchase their road and pay for it in capital stock of the mortgagors, to be issued by them, and which they were thereby authorized to issue accordingly, for the purpose.

Of the capital stock of the Sea Shore company (which did not exceed 1718 shares) the mortgagors (then as before mentioned, by change of name, the New Jersey Southern Railroad Company) lawfully acquired under this authority 1619 shares, or thereabouts, and a consolidation of the roads was, in fact, made.

The Sea Shore company ceased to keep up their separate organization, except as a mere matter of form and in the interest of the Southern company; they surrendered to the Southern company their railroad, property and equipments, and the latter took and retained until the filing of the bill, entire, absolute and exclusive possession thereof accordingly, to their own use, in all respects, and used them as their own, as part of their own plant and undertaking, and as part of their main road. The Southern company, abandoning their terminus and terminal arrangements at Port Monmouth, made the terminus of the Sea Shore road at Sandy Hook their only point of connection with New York, and spent over \$300,000 in repairs to, and equipment of the Sea Shore road, and in building station and engine houses, etc., on that road, and with their own funds constructed about three miles of railroad in extension of the Sea Shore road from what was its then terminus to its present terminus on Sandy Hook, and this extension and its piers, slips and other structures became and were and are an undis-

tinguishable part of the continuous line of the Southern road, which can not be operated without them. In fact, the consolidation was actual and complete in all respects. The purchase and sale and delivery of the stock (sixteen-seventeenths of the whole), by virtue of the legislative authority referred to, for the purpose of consolidation, and the consequent actual, practical and absolute consolidation completely recognized in all things, will be held in equity to be a consolidation in accordance with the provisions of the act. If the provisions are lacking, it is not in substance, but form merely; the consolidation has been fully acquiesced in. If the consent of the stockholders of the companies does not appear, it has, nevertheless, been given. The Southern company bought, and the stockholders of the Sea Shore company sold. The board of directors of the former represented the whole of the stockholders of their company in the purchase, and the stockholders of the Sea Shore company acted for themselves. Two-thirds of the stockholders of each company have, in fact, consented to the consolidation. The Southern company are the owners of two-thirds of the capital stock of the Sea Shore company.

The complainant is, as to the railroad and its appurtenances so acquired and constructed, on the case made by the bill, entitled to specific performance of the covenant for further assurance in his mortgage, and it might be decreed in this suit. Equity will, in such a case as is presented here, supply the formalities. Story's Eq. Jur., 98; Gibbs v. Marsh, 2 Metc. 243; Shakel v. Duke of Marlborough, 4 Madd. 463; Metcalfe v. Archbishop of York, 1 M. & C. 547; Brown v. Higgs, 8 Ves. 561; Amerman v. Wiles, 9 C. E. Green, 15.

The bill, as before stated, alleges that the demurrant, while president of the Southern company, fraudulently possessed himself of this stock, and charges that when he took it, it was with full notice of the complainant's mortgage, and of the legal and equitable lien thereunder upon, and rights in, the stock.

The question raised by the demurrer on this head is, whether the mortgagors, whose power to mortgage the real estate then owned by them, and the personal property which they then owned and had in possession, is not questioned, had the power to mortgage personalty thereafter to be acquired. The

acquisition of the stock under the authority of the act of the legislature, was, as before stated, the means by which the road of the Sea Shore company was acquired. The mortgage covers the real property so acquired, and if the means of acquirement, the stock, only be considered, it covers them. The mortgaging of personalty thereafter to be acquired, was a legitimate exercise of the power to mortgage personal property, granted by the act of 1854, and it will be maintained and effectuated in equity accordingly. Story's Eq. Jur., 1040, 1055; Willink v. M. C. & B. Co., 3 Green's Ch. 377; Coe v. Pennock, 2 Redf. Am. Railw. Cas. 667; Pennock v. Coe, 23 How. 117; Galveston R. R. Co. v. Cowdrey, 11 Wall. 459; U. S. v. N. O. R. R., 12 Wall. 362; Mitchell v. Winslow, 2 Story's C. C. R. 630. The mortgage in question has received confirmation in the above-mentioned supplement to the charter of the Raritan and Delaware Bay Railroad Company (pamph. L. 1870, p. 230), the preamble of which act recites the giving of the mortgage under which the sale to Messrs. Williamson and Titus was made, and the subsequent organization of the company by them and their associates; the issuing of the capital stock of the new corporation, and the giving of the complainant's mortgage, and the act thereupon ratifies and confirms the proceedings set forth in the preamble.

The demurrant objects that the complainant's mortgage is not valid as to the stock, because it was not filed according to the provisions of the "act concerning chattel mortgages." A mortgage of capital stock of a corporation is not within that act. Such stock is not goods or chattels within the meaning of the statute. It is obvious that the act has reference to pledges of personal property of a kind which is capable of visible possession. The Massachusetts act, requiring the recording of chattel mortgages, provides that "no mortgage of personal property shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage be recorded by the clerk of the town where the mortgagor resides."

In *Marsh v. Woodbury*, 1 Metc. 436, it was held that it applied only to goods and chattels capable of delivery, and not to the defeasible or conditional assignment of a chose in action. See also *Winsor v. McLellan*, 2 Story's C. C. R. 492. But as

between mortgagor and mortgagee, a mortgage of chattels is good without filing, and a mortgage of chattels which has not been filed is valid against a subsequent purchaser or mortgagee of the chattels, with notice. *National Bank of the Metropolis v. Sprague*, 6 C. E. Green 530. The bill, as has been stated, alleges that the demurrant, when he took the stock, had full notice of the complainant's mortgage, and of the lien and rights on and in the stock created and conferred thereby. On the bill his attitude is that of a fraudulent trustee inequitably seeking to convert the trust funds to his own use. If such be his true position, and on demurrer it must be assumed that it is so, for so the bill declares it, the objection that the mortgage was not filed is not available to him.

Nor can the demurrant avail himself of the objection which he urges in favor of creditors of the Southern Company as against the mortgage. The mortgage is as to the stock, even if it be conceded that the stock is within the act concerning chattel mortgages, good as against everybody but those who are hindered or defeated. Any person, therefore, who would contest it, must establish his position before the court as one of those in aid of whom the statute was framed.<sup>1</sup> *National Bank of the Metropolis v. Sprague*, *supra*.

The demurrer will be overruled, with costs.

## SECTION TWO.

**Attorney-General v. Boston & Maine Railroad, 109 Mass. 99.**

**Consolidated company allowed in one state to increase its stock by method given by statute in another.**

Information brought by the Attorney-General to restrain the Boston & Maine Railroad from increasing its capital stock for the purpose of extending its road, and from issuing the new stock at par to its stockholders. Respondent is a consolidation of companies of Massachusetts and other states; it is made subject to the general laws of these states respectively, and to the same duties and liabilities as the several cor-

<sup>1</sup> Recent instructive case is *Farmers L. & T. Co. v. Toledo, etc. Co.*, 67 Fed. R. 49, sustaining a consolidation on the theory of its being a *de facto* corporation, and acquiesced in, though notice required to be given to stockholders had not been given and certificate not recorded. See the opinion in full, citing many cases.



porations of which it was formed.<sup>1</sup> By an act of Maine<sup>2</sup> the corporation is authorized to make the extension, and to increase its capital stock by a sum not exceeding two millions of dollars, and to issue the same in the mode adopted by defendants; the law of Massachusetts existing at that time<sup>3</sup> allowed the same mode, but was changed before the vote of the stockholders was had<sup>4</sup> authorizing the directors to issue the new stock.<sup>5</sup> Such action of defendant is illegal if the latter statute is applicable to the case.

The action was legal under the statute of Maine, and if the State of Massachusetts had not acted in the matter at all there would be a very important question presented as to the relative powers of the several states by whose concurrent action the consolidated corporation has been created, acting independently of each other, over the corporation, and particularly over that part of the road situated within their limits. But the latter state has taken action on the matter; while forbidding an extension of the road, or an increase of capital without legislative consent,<sup>6</sup> yet the act also contains a proviso that it shall not be construed to prohibit the Boston & Maine Railroad from extending its railroad to Portland, in the State of Maine, "under authority granted by the legislature of said state;" this is equivalent to a consent to the increase of stock and manner of issue set forth in the Maine statute. Defendant, for the same reason, is also exempt from Chapter 392, which requires that the new stock be sold at public auction in Boston. The legislature has permitted the proposed extension to be made under the laws of the State of Maine, and hence this chapter (392), as well as Chapter 389, are not applicable to the case; both were passed at the same time; they form part of one system, and it would be inconsistent with the above named proviso if they were made applicable to this case. Information dismissed.

<sup>1</sup> Sts. 1841, c. 56; 1843, c. 90; St. of N. H. 1841, c. 6; St. of Maine, 1843, c. 108.

<sup>2</sup> Approved February 17, 1871.

<sup>3</sup> St. 1870, c. 179.

<sup>4</sup> December 13, 1871.

<sup>5</sup> Sts. 1871, cc. 889, 892.

<sup>6</sup> St. 1871, c. 889.



## SECTION THREE.

**New York & Sharon Canal Co. v. The Fulton Bank, 7 Wendell, 412.**

**Corporations, even if not legally consolidated, may be tenants in common in a fund.**

Suit in assumpsit by two canal companies to recover from a bank a sum placed there in a single joint deposit for the benefit of both. A witness, who made the deposit, offered to prove such facts as would establish the consolidation of the plaintiffs. The offer was refused, and plaintiffs nonsuited below; reversed in Supreme Court.

Plaintiffs contended that they might be tenants in common of the fund.<sup>1</sup> Defendant replies that they can not consolidate nor create a joint fund for such illegal purpose; they must sue separately at law, each for its share, or jointly in equity. Notwithstanding their agreement to unite, the law views them as separate bodies.<sup>2</sup>

The court concedes that the general principle is against the power of corporations to consolidate their stock or form partnerships. They have only such powers as are granted, and those necessarily incident. The plaintiffs, not being partners, make a joint deposit; hence, they are tenants in common in the fund, and may sue jointly for it at law. Two banks may take one security from a failing debtor, and thus be joint obligees in the same bond. The plaintiffs here can not bring separate actions for the share of each in said fund, as the bank can not know how much belongs to each, and should not have the responsibility of deciding. Hence, if they can not bring a joint action, the bank could retain a fund which it admits belongs to the plaintiffs, or could drive them into equity. The action in assumpsit is sufficient.

<sup>1</sup> Citing 1 Kidd, 108; 2 Kent. Com.,   <sup>2</sup> 14 Mass. 58; 1 Pick. 297, 395.  
215.

# SECTION FOUR.

**Union Trust Co. v. Illinois Midland Ry. Co., 6 S. C. R. 809, 117 U. S. 484.**

**Technical defects cured by acquiescence and by new rights vesting on the strength of the consolidation.**

Various roads having become united by consolidation, or merger, or purchase, afterward were subjected to foreclosure, pending which they were placed in the hands of a receiver, who received orders from time to time from the court, authorizing him to expend money for betterments, improvements and expenses, and to issue his certificates for the same. These orders are, in the main, sustained by the supreme court.

Particular objection was made by the holders of the surrendered and unexchanged bonds of one of the original companies, on the ground that they had nothing to do with the conduct of a joint enterprise, and could derive no benefit therefrom; that they had denied constantly the validity of the sale of the road, and did not acquiesce in any act of union of the roads.

The argument is made that there was no affirmative legislative authority for the purchase and sale of the Paris & Decatur road. The circuit court was of the opinion (and the supreme court sustains it) that the warrant for the purchase could be found in the charter of the purchasing company; the effect was to establish a continuous line; there is nothing in the charter of the selling company expressly forbidding it; the arrangement has been fully executed, and never questioned in a direct proceeding by the state or by those interested in the selling company; and hence the inquiry as to the matters involved in the case should not be determined by the technical validity of said contract of sale. This is one of the many instances in which contracts, though originally invalid and not obligatory upon the parties, should be allowed to stand, because they have been executed and the rights of others have been acquired with reliance thereon and expenditure of money therefor.<sup>1</sup> By legislation and judicial construction great encouragement has been given to the union and consolidation of lines in order to bring them under the same management.<sup>2</sup>

<sup>1</sup>Thomas v. Railroad, 101 U. S. 71.

<sup>2</sup>Dimpfel v. Ohio & M. Ry. Co., 9 Biss. 129.

Hence, the persons now objecting are estopped; by reason of their acquiescence and failure in due time to question by a proper proceeding the validity of the acts of which they now complain; and furthermore, they are estopped (and this is a sufficient ground by itself) because of their allowing, without objection, the receiver and court for a long time to contract debts with reference to the whole line as a unit, until it became too late to be able to separate the portions of the line with reference to the benefits and expenditures conferred upon or incurred by each respectively, and to adjust the accounts between them accordingly; and also because important rights have grown up based on the unity of the interests of all the roads.<sup>1</sup>

### SECTION FIVE.

**Mead v. New York, Housatonic & Northern R. R. Co., 45 Conn. 199.**

**Defects cured by acquiescence of parties and by legislative recognition.**

Bill to foreclose a mortgage made by the New York, Housatonic & Northern R. R. Co., a corporation created by the consolidation of two previously existing corporations, one of which bore the same name and was located in part in Connecticut and in part in New York; the other was located wholly within New York. The foreclosure was resisted by a creditor and stockholder of the consolidated company, upon the following, among other, grounds; the mortgagor at the time of making the mortgage had no legal or valid existence; the agreement for the consolidation was then inoperative and void because neither of the corporations was then "operating a railroad either wholly within or partly within and partly without the State of New York;" that the consolidation, if valid in the State of New York, did not and could not transfer to the new company the rights, franchises and property of the old company in Connecticut, and the new company at the time of the mortgage had no interest therein. Judgment sustaining the mortgage, affirmed.

<sup>1</sup> This is submitted as a sufficient statement of this decision so far as it concerns corporate combination; the case covers some twenty-five pages in the Reporter and concerns mostly the duties and powers of receivers. See, also, *Bradford v. Frankfort, etc., Co.*, (Ind.) 46 N. E. R. 741, a very complete and recent discussion of this topic.

The New York, Housatonic & Northern Railroad Company was, on September 8, 1863, duly organized under the laws of the State of New York, to establish a road from a point in New York to a point in Connecticut. On July 1, 1864, that company obtained legislative permission from Connecticut, to extend its road into Connecticut. On May 1, 1865, this corporation was authorized by the legislature of New York to accept and exercise the powers conferred by the statute of Connecticut.

May 20, 1869, an act was passed by the legislature of New York providing for consolidation of railroad companies.

On April 18, 1872, the above company and the Southern Westchester Railroad Company were consolidated.

The only person objecting is himself a creditor and stockholder of the consolidated company; it is an extraordinary claim for him to make and is fully answered by an act of the New York legislature of 1873, which recognized the existence of the consolidated corporation, and thereby ratified and confirmed the agreement by which it was effected.<sup>1</sup> It is said, however, by counsel, that the recognition was merely of the corporation and did not operate as a ratification of the agreement of consolidation; but the cases hold that where the legislature has recognized a corporation all inquiry into the regularity of its organization will be precluded.<sup>2</sup> The consolidation was also authorized by an act of the Connecticut legislature.<sup>3</sup> Said act, requiring that the consolidation shall be in pursuance of the laws of the State of New York, is complied with by any proceeding in that state by which the consolidation is lawfully effected, whether by a lawful agreement for such consolidation, or an act of the legislature effecting it, or a recognition by the legislature of the consolidated corporation as in existence. The legal existence of the consolidated corporation, in Connecticut as well as in New York, is thus conclusively established; its effect was to transfer to the new company all the property of the old in each state, and disposes of the objection in that respect. The consolidated company also obtained all the powers of the original companies, including the powers to

<sup>1</sup>New York Statute of 1873, page 293. ham, 85 Ill. 562; Kenawha Co. v. Kenawha, etc., Coal Co., 7 Blatch. 891

<sup>2</sup>Black River R. R. Co. v. Barnard, 81 Barb. 258; The People v. Farn-  
<sup>3</sup>July 31st, 1872.

borrow money and make mortgage; hence, the mortgage is valid.<sup>4</sup>

### SECTION SIX.

**Taylor v. Atlantic & Great Western R. R. Co., 57 How. Pr. (N. Y.) 26.**

**Consolidation of prior consolidation may make a purchase money mortgage; the bonds replace those of the constituent companies.**

Action to foreclose a mortgage made by a consolidated railroad company. The defendant bank holding not quite \$2,000,000 of the bonds, asserts that only about \$7,000,000 in all of the entire issue of \$56,000,000 are valid, and that the rest should be declared invalid. Judgment sustains the entire issue.

The scheme devised, divested of the peculiar forms followed for carrying it into effect, was, in substance, the sale of the property under foreclosures for the benefit of the creditors, its purchase by them through the agency of the three persons se-

<sup>1</sup> Citations by appellant's counsel covered, among others, the following propositions: The New York law (2 N. Y. Rev. Stat. 556) requires that the consolidating roads should be operated. "Operating" means constant use in the running of trains, in its regular course of business for passengers and freight, over its entire length. *People v. Albany & Vermont R. R. Co.*, 24 N. Y. 261; *State v. Hartford & New Haven R. R. Co.*, 29 Conn. 588. The facts do not show such operating. Consolidating companies must bring themselves clearly within the provisions upon which the authority is granted. *Green's Brice's Ultra Vires*, 278. A charter being a contract, any alteration must have the sanction of the legislature. *Id.* 539. The legislature itself can not make any alteration without previous public notice. Gen. Stat. 79. A corporation can not even dissolve itself: *Reed v. Cornwall*, 27 Conn. 48; nor form another, either alone or with others: *Medical Institution v. Patterson*, 1 Denio 61; a ratification act must have the usual formalities and be passed with intent to ratify: *Bishop v. Brainard*, 28 Conn. 289; recognition applies only to defects in form: *Black River, etc., R. R. Co. v. Barnard*, 81 Barb. 758. The original Connecticut corporation remained even if the consolidation was valid in New York: *Muller v. Dows*, 4 Otto, 444, 447; no authority is shown for the title to the property passing out of the Connecticut corporation; its grant of powers are to be strictly construed: *Green's Brice's Ultra Vires*, 68; the powers are fixed by the law of the state granting the charter: *Penobscot Boom Corporation v. Lawson*, 16 Maine, 224; *Michigan Bank v. Gardner*, 15 Gray, 362; it has only such powers as are expressly granted or necessary to carry these into effect: *Occum Co. v. Sprague Mfg. Co.*, 84 Conn. 541; *New York & Hartford R. R. Co. v. Kip*, 46 N. Y. 552; 2 N. Y. Rev. St. 391.

lected by them, and who acted as their trustees, and the sale to the railroad company formed by the consolidation of the intermediate corporations and a mortgage executed by the latter to secure its obligation to pay the purchase price. This does not materially differ from an ordinary sale of property on credit, where the purchase price is secured by the mortgage of the purchaser given on the property. The power to buy would seem to include the power to become obligated to pay the purchase price, and to secure it by mortgage. While the company held property so purchased it would be plainly estopped from denying its liability for the price.<sup>1</sup>

The defendant bank having received, and now claiming under, the bonds secured by the mortgage, is estopped from denying the facts recited in the mortgage. Most of these bonds were issued and used to replace other bonds issued by previous railroad corporations, some of which owed portions of, and one of which acquired title to, all the property of the present corporation.

The residue, not over \$2,000,000 (held almost entirely by defendant bank), were known as surplus bonds and used in the purchase of rails and the borrowing of money for the use of the railroad corporation. The property involved will not sell for more than \$12,000,000, at the most.

While corporations can act only within the limits of authority affirmatively given them or appropriately requisite for the attainment of the objects they were designed to accomplish, and while this highly salutary rule is to be observed in order to prevent corporations from becoming, what they are so often inclined to become, unrestrained and destructive monopolies of individual enterprise, yet when their acts, with this restriction, appear authorized, they are to be sustained.

The creditors and bondholders of the original corporations, of New York, Ohio and Pennsylvania, respectively, had the right to have the properties sold on mortgage foreclosures, and to have them bid in by trustees for them. The consolidation of these corporations was within the authority of the law, which does not bar from its privileges corporations which themselves were formed from prior consolidations.<sup>2</sup> The only restrictions upon consolidation are that they form a continuous

<sup>1</sup> Whitney Arms Co. v. Barlow, 63 N. Y. 63.

<sup>2</sup> Laws of 1869, Vol. 2, 2399. 30, Sec. 1; Id. Vol. 1, 2403, Sec. 9.

line and that they shall not be parallel or competing lines. The sundry laws of Pennsylvania and Ohio<sup>1</sup> authorized the act of the respective corporations of those states.

The three corporations which afterward entered into the consolidated company executing this mortgage, must be regarded as having been lawfully formed. They each actually existed, and had the power to exercise all the functions secured to such corporations under the laws of their respective states. And while it was in terms provided that the newly formed corporation should hold the property purchased free and discharged from all liability for the debts of the original corporation, as that was a provision made solely for its benefit and advantage, it could be waived by it; for this power of waiver has been so far extended as to permit it to be exercised as to statutory and even constitutional advantages.<sup>2</sup> The statute did not prohibit the new corporation from assuming the debts of its predecessors; it simply exonerated it from liability for them. And that privilege was waived by the agreement pursuant to which the sale was made and the new corporation formed. For it was a portion of the plan that the debts should be carried along and assumed by this corporation, and the one which was ultimately to arise out of the consolidation. The intent throughout was to provide for the security of the creditors. The proceedings were circuitous, but rendered necessary because the law did not provide for the original formation of the continuous corporation whose railroad was to extend and be operated in all three of the states; it was necessary to form a corporation in each and then consolidate them.

The prior laws seem to have restricted the issuing of mortgage bonds to the purpose of completing or operating the roads,<sup>3</sup> but the later law is more comprehensive and allows the directors of companies proposing to consolidate to enter into an agreement prescribing the terms and conditions for the consolidation, and the mode of carrying it into effect, the same to be submitted to the stockholders and receive the approval of

<sup>1</sup> Wilcox Railroad Laws of Ohio, 224, 227, Sec. 2.

<sup>2</sup> Laws of 1850, ch. 140, ch. 225, sec. 28, sub. 10, made applicable to consol-

<sup>3</sup> Buel v. Lockport, 8 Conn. 197; Lee v. Tilleston, 24 Wend. 337; People v. Murray, 5 Hill, 408; Houston v. Wheeler, 52 N. Y. 641.



two-thirds of their votes for it.' Even if the local corporations could not issue bonds, secured by mortgage, for any purpose other than completing the road, yet that did not prohibit them from assuming the debts of their predecessors, nor from consolidating thereafter on whatever terms might be agreed on; among which there could be one that the new corporation should issue its mortgage bonds, as was done; the evident intention was that the railways in each of the three states should be sold for the benefit of the creditors, whose demands far exceed its value; that these demands should be transmitted through the local corporations to the new consolidated company to be formed, and then secured by its bonds and a mortgage upon its property.

It is objected that mortgages are excepted from the obligations which, by statute, are to attach to and rest upon the new company;<sup>1</sup> but there were no such mortgages existing against the constituent consolidating company in this state. And no mortgage was assumed either by that or either of the other companies in point of fact. Simply, debts were assumed and carried along, to be provided for in the final organization, as was allowed by the very general authority created by the act of 1869.

Later statutes more clearly manifest that such was the legislative policy.<sup>2</sup> The laws of Ohio<sup>3</sup> and of Pennsylvania<sup>4</sup> are similar in their policy and in the authority conferred.

The bank advanced its money on vouchers, plainly referring to the mortgage and giving notice of its provisions and purposes, and is estopped from denying the same; the other bonds are equally entitled to its protection with those held by the bank. The covenant in the mortgage that the property is free from incumbrance makes no difference, for it was in fact freed from the prior mortgages, but nevertheless the respective prior debts remained in full force and were legally assumed and provided for in accordance with the design of the parties having the authority to control the disposition of the property.

It is unnecessary to decide that the bank, having derived its entire right to protection under the mortgage, can not assail

<sup>1</sup> Laws of 1869, sec. 2; sub. 1 and 2.

<sup>4</sup> Wilcox R. R. Laws, 184, 140.

<sup>2</sup> Laws of 1869, sec. 2402, sec. 5.

<sup>5</sup> General R. R. Laws Pa., 81, 121,

<sup>3</sup> Laws of 1874, Ch. 430, 1876, Ch. 122.



its validity; it is sufficient to hold that all the bonds are legal obligations of the company; the creditors whose debts were assumed and bonds issued to them are equally entitled to protection with the bank which advanced money on the hypothecation of bonds; there is an equally valid consideration from each.

### SECTION SEVEN.

**Leavenworth Co. v. Chicago, Rock Island & Pacific R. R. Co., 10 S. C. R. 708; 134 U. S. 688.**

**Provision, requiring filing of acceptance, held directory; certificate of secretary of state is conclusive evidence of consummation of consolidation.**

Bill to set aside a foreclosure sale; mortgage is alleged to be invalid because statutory provision requiring each of the constituent corporations of a consolidated corporation to file with the secretary of state a resolution accepting act of consolidation was not complied with, hence such consolidated corporation was illegal, and the mortgage by it invalid.

The provision is held to be directory and not mandatory, and the mortgage valid. The entire act considered shows that this provision was of minor importance; but, if otherwise, then the matter in question may be deemed solely one between the state and the corporation, hence only the state can complain of the failure to file the acceptance. The certificate from the secretary of state is made conclusive evidence of the consummation of the consolidation.

### SECTION EIGHT.

**Hamilton v. Clarion M. & P. R. Co., 23 Atlantic 53; 144 Pa. St. 34.**

**Stockholders acquiescing in defective organization can not plead it.**

Where statute requires that merger shall be by one existing company into another existing company, yet where they merge into a new company and are dealt with as such by their own stockholders, the latter can not, when sued by a creditor of such company, avail himself of this defect in the merger.

## SECTION NINE.

**Wells v. Rogers, 27 N. W. 678; 60 Mich. 525.**

**The constituent companies should separately conduct the consolidation proceedings.**

Under Michigan statutes the notices should be signed separately, and not jointly, by the two secretaries, just as the meetings should be separate. Publication for each road need be only in the counties in which it runs. Proceedings in consolidation are held regular and sufficient, and defendant is bound to pay the amount subscribed by him to one of the constituent companies, which subscription, by force of statute, became the property of the consolidated company.

## SECTION TEN.

**The Philadelphia & Erie R. R. Co. et al. v. The Catawissa R. R. Co. et al., 53 Pa. St. 20.<sup>1</sup>**

**Connecting roads defined.**

Roads may be connecting, although of different gauges, and by means of intervening roads; the statute<sup>2</sup> says: "That the roads of the companies so contracting, or leasing, shall be directly, or by means of intervening railroads, connected with each other."<sup>3</sup>

**READ, J., dissents.**

<sup>1</sup> Cited with approval in *P. & B. T. Co. (Pa.)*, 30 Atl. R. 931.

<sup>2</sup> Act April 23, 1861.

<sup>3</sup> The opinion of Mr. Justice Read at *nisi prius*, the briefs of counsel and the opinion of the Supreme Court are very instructive. They discuss exhaustively the various propositions involved. Among others, whether a court should interfere at the instance of a complainant who has an interest in a rival road, and brings his suit for the purpose of aiding such rival. On this there were cited, among others, *Sanford v. Railroad Co.*, 12 Harris 878; *Gratz v. Pa. R. R. Co.*, 5 Wright 447; *Ffooks v. S. W. R. Co.*, 1 Smale & Giffard 142; *Rogers v. Oxford, etc., Ry. Co.*, 2 De Gex & Jones; *Forrest v. Manchester, etc., Co.*, 30 Beav. 40; *Hare v. L. & N. W. R. Co.*, 2 Johnson & Hemming 80; *Coleman v. The Eastern, etc., Co.*, 10 Beav. 1; *Bagshame v. Eastern, etc., Co.*, 6 Railway & Canal Cases, 152; *Simpson v. Westminster Palace Co.*, 8 H. of L. C. 712; *Atty. Genl. v. Great N. R. Co.*, 2 L. T. R. 658; *Hattersley v. The Earl of Shelburne*, 31 L. J. Ch. 873. These hold that the motive of the complainant should not be inquired into. The validity of a charter can not

## SECTION ELEVEN.

**The Commonwealth ex rel. The Attorney-General v. The Atlantic & Great Western Railway Company, 53 Pa. St. 9.**

**Sufficient to deposit articles whether filed or not.**

*Quo warranto* to oust defendant from acting as a corporation.

Defense, that the defendant is a corporation legally formed by the consolidation of several prior corporations.

The attorney-general contended, among other things, that the articles of consolidation had not been filed with the secretary of state, or at all events that there had been no plea or proof to that effect.

It is held that the articles of consolidation were sufficient and lawful, and upon being filed in the office of the secretary of the commonwealth, constituted defendants a legal corporation in the State of Pennsylvania; that defendant should prove that the same was deposited, before institution of the suit, with the secretary of state; if so deposited, it would be his duty to file them; it will be presumed that he has performed his duty; if any indorsements as to date of filing be necessary, a mandamus would lie to command him to add the appropriate date and to perform every other necessary act in the premises.

Subscription, made after consolidation agreement is executed, though before it is filed with secretary of state, is valid.

## SECTION TWELVE.

**McClure v. People's Freight Railway Company, 90 Pa. St. 269.**

**Subscription made after consolidation agreement is executed, though before it is filed with secretary of state, is valid.**

Debt by the People's Freight Railway Company to recover from McClure the amount of installments of a subscription

be inquired into in a collateral proceeding. *Com. v. Allegheny Bridge Co.*, 8 Harris 185; *Irvine v. Lumberman's Bank*, 2 W. & S. 190; *Com. v.*

*P. G. & N. R. Co.*, 8 Harris 518; *Dyer v. Walker*, 4 Wright 157; *Com. v. Jones*, 2 Jones 365; *Murphy v. Farmers' Bank*, 8 Harris 415; *Mechlin v. Kittanning Bank*, 1 Grant 416.

The commonwealth alone can in-

vestigate the matters complained of. 1 Redf. on Railroads, 1867, ch. 4, sec. 1, pl. 9, p. 66; A. & A. on Corp. sec. 94.

A complainant who is striving to advance the interests of a rival company, at the expense of his own, has no standing in court. 1 Redf. on Railways, ch. 4, sec. 8, pl. 14, p. 75.

to the stock of the company. The plaintiff company was formed from the consolidation of three railroad companies. The agreement to consolidate was effected about November 17, 1873, but was not filed in the office of the secretary of the commonwealth until December 13, 1873; defendant subscribed between these two dates; and contends that as no company was yet in existence when he subscribed, he is not bound by the subscription, for there can not be a contract unless there are two contracting parties.<sup>1</sup>

The court concedes that this might be a good defense in a case in which no corporation exists at all, but holds that the consolidated corporation came into existence by the execution of the agreement on November 17, 1873. "Nothing remained to be done to authorize the company to act as a corporation but to file the agreement in the office of the secretary of the commonwealth," who had no discretion to reject it. "This consolidated company was not a new grant of corporate franchises, but another form for operating those which had been granted to the companies merged by their mutual agreement. To liken this to a case where there was no charter and could not be without legislation, is a perversion. In this, the grant of rights and powers had been made; in that, they were to be procured. The corporate existence of this company depended solely upon the contracting parties; of that, upon legislative grant." The defendant is therefore held liable, as having subscribed to the capital of a company already formed by the agreement of November 17, 1873, which, by filing the same on December 13, 1873, acquired legal existence and could act. The company accepted the subscription and made calls thereon; the first call was paid. The subscription was at least a valid proposition to the plaintiff, which became irrevocable the instant it was accepted. Whether defendant could have recalled it before the filing of the agreement, is not a point in the case.

### SECTION THIRTEEN.

**In re Washington St. A. & P. R. Co., 22 N. E. 356; 115 N. Y. 442.**

**Street railroad companies may consolidate.**

Proceedings for acquiring a crossing, instituted by a street railroad company, formed by consolidation of other compa-

<sup>1</sup>Strasburg R. R. Co. v. Echternacht, 9 Harris 220.

nies. Defendants objected to the petitioner's capacity, and claimed that street railroads had no right to consolidate. Decision is against this position. The court concedes that in the railroad consolidation act of 1869 there was a clause specially excluding street railroads from its provisions; but in 1875 the legislature passed "An act in relation to railroad corporations;" it was not an amendment to the act of 1869, but an original act on the subject, and allows the consolidation of any two or more companies organized under the laws of this state, etc. This language is held broad enough to embrace street railroad companies.<sup>1</sup>

#### SECTION FOURTEEN.

**St. Louis V. & T. H. R. Co. v. Terre Haute & I. R. Co., 33 Federal 440.<sup>2</sup>**

**Only the stockholder can raise the objection of absence of his written consent.**

Where the statute requires the written consent of the stockholders to the consolidation of roads, or leasing of the same, and such consent is not obtained, it will be deemed waived after 19 years' acquiescence upon a 999 year lease; the objection of want of written consent can be raised only by the stockholder, hence, in this case, can not be entertained upon a bill brought by the lessor company to cancel the lease.

#### SECTION FIFTEEN.

##### Sundry instances.

The tendency is to construe consolidation laws liberally and to reject plea of *ultra vires*, especially after delay (four years) and after other rights have attached. (Drummond, J.) Dimp-

<sup>1</sup> Affirming same case in 5 N. Y. steam railroads, it would have inserted Supplement 355, in which the facts therein a provision in express terms are more fully recited, and which cites restricting its application to such *Ellice v. Winn*, 12 Wend. 343, *Farley roads*.

*v. De Waters*, 2 Daly 192, and *Norris v. Crocker*, 13 How. 439. upon the proposition that if the legislature had intended to limit the latter acts to

<sup>2</sup> Citing *Thomas v. Railway Co.*, 104 Ill. 462; *Taylor v. Railroad Co.*, 4 Woods 575; *Beecher v. Mill Co.*, 45 Mich. 103; 7 N. W. R. 695.

fel v. Ohio, etc., R. Co.; VIII, The Reporter, 641; Sept. term, 1879, C. C. S. D. Illinois.

Defective organization of a bank may be cured by act of legislature. This is neither special nor retroactive legislation; it is not the creation of a corporation. *Syracuse City Bank v. Davis*, 16 Barb. 188.

Irregularities in consolidation not questioned by the state can not be taken advantage of by a corporation which derives its right through the consolidation. *Beckman v. Hudson River W. S. R. Co.*, 35 Fed. 3.

Consolidation of two water companies commenced during existence of statute, may be consummated after its repeal; the repealing act preserves accrued rights. *Cameron v. N. Y. & Mt. V. W. Co.*, 31 N. E. 104.

"Temporary" consolidation may be effected, when authorized by statute. In such case both constituent companies may be deemed to continue, yet the one may control the other by holding all of its stock; as, for instance, a land company may acquire all the stock of a railroad company; see discussion in *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 56.

## CHAPTER VI.

## CONSOLIDATION PROCEEDINGS HELD INVALID.

Cases in this chapter considered involve chiefly construction of particular statutes; general principles can not be readily deduced; each case depending greatly upon its own facts, terms of contracts, text of statutes.

When consolidation is prohibited, the same effect is not allowed to be brought about under the guise of a lease; competition would be thereby checked.

Nor can consolidation be made under power of amendment to articles of association when prohibited by the terms of such articles.

Continuity of the consolidated lines must exist without the use of leased lines; the power to lease does not imply the power to consolidate, nor the power to consolidate, the power to lease; the construction is to be that which is least favorable to the existence of the power; the provisions made requisite must be strictly followed to effectuate consolidation; the courts are not to speculate as to their propriety.

A continuous line must be single and extend and continue in substantially the same general direction; lines may be connecting and yet not continuous. The statute of consolidation gives great and unusual powers to private corporations, and should be strictly construed; no construction should be such as to create monopoly or confer powers not expressly conferred or necessarily incident to their business. Exceptions and restrictive clauses are to be strictly construed so as not to take a case within the general terms of a statute out of it.

## SECTION ONE.

**State v. Atchison & N. R. Co., 38 N. W. R. 43; 24 Neb. 143.**

**Lease prohibited where consolidation would be prohibited.**

Original proceeding in *quo warranto* in the Supreme Court.

By the Constitution of Nebraska a railroad corporation is prohibited from consolidating with any other owning a par-

allel or competing line; this prevents a company from leasing its road to such other company; the lease would have the same effect, and be the same as a consolidation.

The constitutional convention aimed at practical results. The character of the title of the parties operating a railway is of but little moment to the general public; the requirement that different roads shall continue to be competing is of the utmost importance. The law can not be evaded by substituting a lease for a deed of conveyance. The making of the lease by the defendant subjects its franchises to forfeiture; the court will not, in the first instance, however, declare a forfeiture,' but the lease will be declared void.

Demurrer overruled, with leave to the defendant to answer.

## SECTION TWO.

**Blatchford v. Ross, 5 Abbott's Pr. N. S. 434.**

**Consolidation prohibited in articles of association; not permitted under article allowing amendments.**

The articles of association prohibit consolidation without consent of the majority of the stockholders; they allow amendments to the articles to be made by vote of two-thirds of the executive committee and a majority of the trustees. The latter clause does not control the former; it must be limited to such amendments as are pertinent to the business and objects for which the association was organized. The unanimous voice has been deemed necessary to change the provisions.<sup>1</sup> Even an act of legislation has been deemed insufficient to compel a change of business in a corporation.<sup>2</sup> Amalgamation, although provided for in the articles, has been held invalid when it results in an assessment for the purpose of carrying out the amalgamation.<sup>4</sup>

<sup>1</sup>State v. Omaha, etc., Co. (Iowa), 60 N. W. R. 121, presents almost a treatise upon the topic: when ouster will and when it will not be adjudged; reviewing many authorities. <sup>2</sup>Hartford, etc., v. Cromwell, 5 Hill 383.

<sup>4</sup>Church v. Financial Corporation, 5 Eng. L. & Eq. 540; China v. Bank of Hindostan, 6 Eng. L. & Eq. 91.

<sup>3</sup>Livingston v. Lynch, 4 Johns. Ch. 573.



## SECTION THREE.

**The State v. Vanderbilt, 87 Ohio St. 590.**

**The consolidated line must be continuous without the use of leased lines.**

*Quo warranto* to the supreme court in the name of the state, brought by the attorney-general against Wm. H. Vanderbilt and others named as defendants, and alleging that they, in connection with still others too numerous to be brought before the court, have usurped the franchise to be a body corporate under the name of the Ohio Railway Company, and that they wrongfully claim to possess certain corporate franchises, powers and privileges. Record consists of petition, answer, reply and an agreed statement of facts. Judgment of ouster.

Defendants' have the burden to show by what authority they claim to exercise such power; the order of trial is the same as if the cause was for hearing on the testimony, consequently defendants have the open and close in the argument.<sup>1</sup>

Defendants claim to be a corporation arising from the consolidation of several others. Consolidation is claimed under authority of act,<sup>2</sup> which allows it when "the lines of road of any railroad companies in this state, or any portion of such lines, have been or are being so constructed as to admit the passage of burden or passenger cars over any two or more of such roads continuously, without break or interruption."

Defendants' own roads did not allow such continuous passage, but certain roads which they held under *leases* and used in connection with their own did afford such continuous passage. The court holds, however, that the leased roads were not available for this purpose. The lessor companies have at all times maintained their organizations.

The meaning is the *line* of each road; the word is *lines*—in the plural, for the reason that the two companies are referred to in the same form. The consolidation act provides for the manner of converting the shares of stock, compensating shareholders who refuse to convert their stock into the stock of the

<sup>1</sup> Rev. Stats., §§ 5190, 6760, 6772.    <sup>2</sup> § 3379 of Revised Statute.

new corporation; that the consolidating companies should cease to exist, and all their properties be deemed transferred to, and vested in, such new corporation without any other deed or transfer.

Aside from the consolidation act, the railroad law allows the leasing of continuous or connecting lines. By force of lease, only, the right to use the road passes, according to such terms and conditions as are proper in a lease, but nothing else passed. "The lessee is the assignee for a term or period of the lessor—his bailiff to hold possession for him." <sup>1</sup>

Power of lease does not imply the power to consolidate, nor power to consolidate, the power to lease; they are distinct and independent powers; nothing passes under the lease, except the right to the use. The lessor retains its existence, and its right to consolidate with connecting lines; there can be no consolidation except as to connecting lines; these connecting lines belong to the lessor companies, but these have not entered into the consolidation. A company may consolidate "its line of road," but a line on which it has merely a lease is not "its line;" the lessee's title differs from that of a mortgage after condition broken and in possession, though even he may use the legal title only for the purpose of making effectual his security.<sup>2</sup>

While the above view is the positive and plain construction of the statute, yet even if the matter were doubtful, the rule would apply that where a statute granting corporate powers admits of two probable but conflicting constructions, that construction should be given to it which is least favorable to the existence of the power.<sup>3</sup> It is said that the secretary of state has recognized the validity of other similar consolidations and issued certificates. The construction given by the executive department may in some cases aid in the construing of a statute,<sup>4</sup> but there has not been here such uniform construction as to be of any aid, much less to control the construction of the statute.

<sup>1</sup> Penn. R. Co. v. Sly, 65 Pa. St. 205.

<sup>2</sup> Straus v. Eagle Ins. Co., 5 Ohio St. 59.

<sup>3</sup> Harkrader v. Leiby, 4 Ohio St. 602, 612.

<sup>4</sup> Work v. Corrington, 34 Ohio St. 64, 75.

The object of the consolidation seems to have been intended for the purpose of destroying the competition between parallel roads. They are not so constructed as to admit the passage of burden or passenger cars "over two or more of such roads continuously;" although there is present the physical ability to pass cars from the one to the other. The legislature intended "not merely that the physical fact should exist, but that such consolidation should only be made for the very purpose of passing freight and passengers over both lines, or some material parts thereof, not necessarily in a direct or straight line, but *continuously*." Each of the consolidating roads had a line of its own through the same territory, "continuously, without break or interruption." Such companies were not intended to consolidate and thus destroy competition. Continuous transportation is a thing which the legislature undoubtedly meant to encourage; but the consolidating companies, having only such powers as are granted by the general assembly, and being parallel and competing, and now claiming authority to consolidate, must be able to point to words in the statute which admit of no other reasonable construction, "for it will not be assumed that the law-making power has authorized the creation of a monopoly so detrimental to the public interest." Competing lines are prohibited by statute from leasing,<sup>1</sup> and hence it is claimed that no such prohibition was intended against consolidation, or it would have been expressed; but the leasing statutes were drawn separately from and perhaps to overcome certain evils; and at a time when the consolidation acts were not under consideration.

There is also a fatal defect in the organization of the company; the directors of the consolidating companies must set forth in their joint agreement the places of residence of the new directors as well as their number.<sup>2</sup> This has not been complied with. "We are not to speculate as to the propriety of this provision, nor as to the manner it became incorporated in the statutes in its present form. It is sufficient to say the provision is in no sense directory, and that a compliance with it is indispensable."<sup>3</sup>

<sup>1</sup> 1873, 4 Saylor, 2950; Rev. Stats. § 3300.

<sup>2</sup> Rev. Stat. § 3381.

<sup>3</sup> Citing *Atlantic, etc., R. Co. v. Sullivant*, 5 Ohio St. 276; *The State v. Lee*, 21 Ohio St. 662; *Raccoon, etc.,*

Co. v. Eagle, The State v. Cen. O. Association, 29 Ohio St. 238, 399; People v. Chambers, 42 California 201.

Additional citations by plaintiff: Consolidations which have a tendency to prevent a healthy competition between railway companies are against public policy. Pierce on Railroads, Ed. 1881, 518; Green's Brice's Ultra Vires, 417; Sanford v. Railroad Co., 24 Pa. 382; H. & N. H. R. R. Co. v. N.Y. & N. H. R. R. Co., 3 Robertson N. Y. 415; State v. H. & N. H. R. R. Co., 29 Conn. 539; Doolin v. Ward, 6 Johns. 149; Hooker v. Vandewater, 4 Den. 349; Stanton v. Allen, 5 Den. 434; Hood v. N.Y. & N. H. R. R. Co., 22 Conn. 502.

A strict compliance with the statute is necessary; in case of general incorporation the articles must contain the statements required by law; they are conditions precedent to the right to become incorporated. Eastern Plank Road Co. v. Vaughn, 14 N. Y. 546; Hains v. McGregor, 29 Cal. 124; People v. Selfridge, 52 Cal. 381; Dutchess, etc., v. U. Cabbett, 58 N. Y. 397; West v. Ditching Co., 82 Ind. 138; Ferraria v. Vasconcelles, 23 Ill. 403; Bigelow v. Gregory, 73 Ill. 197; Abbott v. Omaha Co., 4 Neb. 416; Childs v. Smith, 55 Barb. 45, 54; Williams v. Franklin Association, 26 Ind. 310; Indianapolis Ins. Co. v. Herkimer, 46 Ind. 142; Field v. Cooks, 16 La. Ann. 153; In re Deveau, 54 Ga. 673; Carlisle v. Cahawba Railway Co., 4 Ala. 70; Becht v. Harris, 4 Minn. 504; Mokelumne Co. v. Woodbury, 14 Cal. 424.

The same rule applies to corporations formed by consolidation; Mansfield, etc., v. Brown, 26 Ohio St. 223; Peninsular Ry. Co. v. Thorp, 28 Mich. 506; Mansfield R. R. Co. v. Drinker, 80 Mich. 124; Tuttle v. Michigan Air Line Co., 85 Mich. 247.

The court can not say that failure to comply with any condition im-

posed by the legislature is not fatal. People v. Kingston Turnpike Co., 23 Wend. 193; Ferraria v. Vasconcelles, 23 Ill. 403; Hains v. McGregor, 29 Cal. 124.

Railroad companies have no power to consolidate unless they come within the statutory provisions. Dartmouth College v. Woodward, 4 Wheat. 518; Thomas v. Railroad Co., 101 U. S. 71; Railroad Co. v. Haines, 12 Wall. 65; White's Bk. v. Insurance Co., 12 Ohio St. 601; Booham v. Taylor, 10 Ohio 108; Shields v. Ohio, 95 U. S. 319; 26 Ohio St. 869.

The power granted is construed strictly and most strongly against the corporation. Comer v. R. R. Co., 11 Ohio St. 231; State v. Gas Light Co., 18 Ohio St. 262; Miami Co. v. Wigton, 19 Ohio St. 560. Where there is doubt it is fatal to the power. Fertilizing Co. v. Hyde Park, 97 U. S. 659; Black v. D. & R. Canal Co., 24 N. J. Eq. 455; In re N. Y. & H. R. R. Co. v. Kip, 46 N. Y. 546; White's Bank v. Toledo Co., 12 Ohio St. 601; Green's Brice's Ultra Vires, 2 Ed. 62.

The continuous roads must belong to the consolidating companies; no agreement or contract merely covering the operation or use of a road will change its ownership. Railroad v. Winans, 17 How. (U. S.) 30; Mayor v. N. & W. R. R. Co., 109 Mass. 103; Mead v. N. Y. H. & N. R. R. Co., 45 Conn. 199; Buck v. Seymour, 46 Conn. 156; Wallace v. Long Island R. R. Co., 12 Hun 460; Provident v. Railroad Co., 7 Lans. 240; Black v. D. & R. Canal Co., 22 N. J. Eq. 130, 403; 24 N. J. Eq. 455; Whitney v. Atlantic & St. L. R. R. Co., 44 Me. 362; Nelson v. Vt. & Canada R. R. Co., 26 Vt. 717; Langley v. Boston & Maine Co., 10 Gray 103; Ohio & Mississippi R. R. Co. v. Dunbar, 20 Ill. 623.

It is contrary to public policy to consolidate competitive roads. Central R. R. Co. v. Collins, 40 Ga. 582;

Midland Ry. Co. v. Great Western Ry. Co., 2 Nev. & Macn. 88; Board, etc., v. L. B. & M. R. R. Co., 50 Ind. 85; Stewart v. Erie Co., 17 Minn. 872; Gas Light Co. v. Same, 25 Conn. 19; Hooker v. Vandewater, 4 Den. 849. Also contrary to public policy to create monopolies. State v. Telephone Co., 86 Ohio St. 296; State v. Gas Light Co., 18 Ohio St. 262; Crawford v. Wick, 18 Ohio St. 190. The power to make the consolidation must be expressly given or clearly implied from the granted powers, or it does not exist. White's Bank v. Toledo Co., 12 Ohio St. 601; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Black v. D. & R. Canal Co., 24 N. J. Eq. 455; Bissell v. R. R. Co., 22 N. Y. 253.

If defendant in *quo warranto* fails in the title he sets up, judgment must be for the state. Cole on Quo Warranto, 212; Rex v. Leigh, 4 Burr. 2143; State v. Sherman, 22 Ohio St. 411-932. Acts granting or extending corporate privileges are to be construed most strongly against the companies. Sedgwick on Statutory Law, 292; Pa. R. R. Co. v. Canal Commrs., 21 Pa. St. 9-22; Commrs. v. E. & N. E. R. R., 27 Pa. St. 339-351; R. R. Co. v. Harris, 12 Wall. 65, 81; 2 Kent's Comm. 299; Dartmouth College v. Woodward, 4 Wheat. 518, 636; Thomas v. R. R. Co., 101 U. S. 71; Strauss v. Eagle Ins. Co., 5 Ohio St. 59-61. Some of the roads being competing could not be leased or purchased by the other; hence should not be consolidated. In effect a consolidation is a purchase. Campbell v. M. & C. R. R. Co., 23 Ohio St. 189, 190; Shields v. State, 26 Ohio St. 86-92; Rev. St., § 3384; 2 Wash. Real Prop., 401; Shields v. Ohio, 95 U. S. 819, 829; Urmeys' Extr. v. Wooden, 1 Ohio St. 160-166.

Citations for defendants:

Consolidation is often very useful and a just mode of management

where competition is liable to do harm, both to the traffic and the shareholders. 2 Redf. Railways, 656. No principle of public policy renders void a traffic arrangement made for the purpose of avoiding competition. 1 Redf. Railways, 613; Port Clinton R. R. Co. v. Cl. Tol. R. R. Co., 13 Ohio St. 544. The leased lines are included in the terms used in the statute; a perpetual lease is a conveyance in fee. Black v. Canal Co., 22 N. J. Eq. 130, 403; Loring v. Melendy, 11 Ohio 355; Northern Bk. of Ky. v. Roosa, 13 Ohio 334; Mahoney v. A. & St. L. R. R. Co., 63 Me. 68; P. S. & R. R. Co. v. G. T. Ry. Co., 63 Me. 90.

The statutory provisions in question are only directory and not imperative. Chamberlain v. P. & H. R. R. Co., 15 Ohio St. 250; Spring Valley Water Works v. San Francisco, 22 Cal. 634; Mead v. Keeler, 24 Barb. 20; Cross v. Pinkneyville Man. Co., 17 Ill. 54; Troy & Ruthland R. R. Co. v. Kerr, 17 Barb. 581; Judah v. Am. L. S. Ins. Co., 4 Ind. 334; Liverpool Bank v. Turner, 30 L. J. Ch. 380. Unsubstantial departures do not injure the public and will be overlooked in *quo warranto*. Com. v. C. P. Ry., 52 Pa. St. 506; People v. Kingston, etc., 23 Wend. 193.

The consolidated company's rights are not new creations but only such as the constituent companies possessed. M., C. & L. M. R. Co. v. Stout, 26 Ohio St. 241; The Same v. Pettis, Id. 259; County of Scotland v. Thomas, 94 U. S. 683; Black v. Delaware, etc., 22 N. J. Eq. 130; Pierce on R. R., 492; Black v. Del. & R. C. Co., 7 C. E. Green, 130, 402; 9 C. E. Green 455. In view of the legislation and acts thereunder for thirty years, great liberality should be exercised in regard to contracts for consolidation. Dimppel v. O. & M. Ry. Co., 8 Reporter 641. Usage may be considered in constru-

ing statutes. *Chestnut v. Shane's Co.*, 82 Cal. 66; 58 Barb. 174; *People Lessee*, 16 Ohio 599; *U. S. Bank v. v. Allen*, 6 Wend.; 5 Cow. 269; 9 Halstead, 10 Wheat 51, 68; 1 Ohio Johns. 147; *People v. Peck*, 11 Wend. 12; 8 Ohio 555; 16 Ohio St. 407. 604; 3 Mass. 230; 24 Pick. 75; 2 Denio Statutes have been held directory 160; 20 Barb. 165; *People v. Halley*, in the following cases: *Thompson v.* 12 Wend. 481; 19 Barb. 540; 7 Hill 9; *State*, 26 Ark. 823; *State v. Carney*, 9 Wend. 143; 14 Barb. 259; 4 Seld. 20 Iowa 82; *Taylor v. Taylor*, 10 88; 15 Ohio St. 573; *Sedgwick on Minn.* 107; *Fry v. Booth*, 19 Ohio St. Con. State, 325. 25; 47 N. Y. 556; *Bowers v. Sonoma*

#### SECTION FOUR.

***People v. Boston, etc., Ry. Co.*, 12 Abb. N. C. 230.**

**Line held not continuous; stocks and bonds illegally issued.**

Action by the People to annul a contract of consolidation between four railroad companies. Judgment for the People; and defendants are restrained from acting in any way as a consolidated company.

The routes of the four companies are set forth in detail, and it is held that the statute which allows companies to consolidate in order to "form a continuous line of railroad with each other," is not applicable. By continuous line is meant a line or route extending and continuing in substantially the same general direction. It excludes the idea of a plurality of lines, and requires that the consolidated roads must form one, instead of two or more lines.<sup>1</sup> It is contended that all connecting lines are continuous no matter how connected or how divergent, and may be consolidated unless they are parallel or competing. It is said that "trains might run from either end of either branch without interruption to either end of the main line." This may be said of all roads which connect and have the same gauge. The mere fact of connection does not, in the technical or statutory sense, form a continuous line; the phrase "form a continuous line of railroad with each other," means a line or route extending and continuing in substantially the same general direction, connecting two principal points.

It is not, however, intended to prevent a road with unimpor-

<sup>1</sup> *Mead v. N. Y. & H. R. R. Co.*, 45 Conn. 199.



tant branches forming no considerable part of the general plan, from consolidating with another corporation, if the lines of both, within the definition above given, form one main continuous line.

The term "may form a continuous line of railroad" excludes the idea of plurality of lines, and conveys the idea that the consolidated line must form one, instead of two or more lines of railroad.

While the routes are not parallel in a mathematical sense, yet they are so within the meaning of the statute, and for that reason can not be consolidated; they connect at Utica, thence both go in a westerly direction, being at no point more than twenty-five miles apart.

The consolidation violates the provision of the law which declares that no bonds or other evidences of debt shall be issued as a consideration for or in connection with the consolidation. The consolidation agreement declares that the bonds shall not be issued as such consideration, but then directs their issue at the rate of \$50,000 per mile on the completed railway.

Facts are recited in detail and the court says: "From these facts the conclusion is irresistible that these bonds were issued in connection with and as a consideration for the consolidation."

The objects of the restrictive clause are to equalize the values of the properties of the constituents by stock to be issued pursuant to the terms of the consolidation agreement and not by bonds issued to either, and to secure the submission of the joint agreement setting forth the terms of consolidation to the unbiased judgment of the stockholders, "to be by them ratified or rejected, upon the intrinsic merits of the plan, uninfluenced by collateral considerations." Perhaps bonds may be issued, though in connection with a consolidation, in good faith, to pay debts; but they can not be issued, as here, for the avowed purpose of raising money wherewith to pay the assenting stockholders for their assent, without which they refused to assent, and thereby promoting the very mischief which this clause was designed to prevent.

The consolidation violates the statute, which declares that "in no case shall the capital stock of the company formed by such consolidation exceed the sum of the capital stock so con-

solidated at the par value thereof." Reason of which is to prevent an unlimited increase of capital.

As to the right to consolidate, the statute should be strictly construed; it grants great and unusual powers to private corporations. It is against the policy of the law to construe statutes so as to create monopolies, or confer upon corporations powers not expressly conferred by statute or necessarily incident to their business.<sup>1</sup>

Exceptions and restrictive clauses are to be strictly construed so as not to take a case within the general terms of the statute out of it, unless it is clearly within the restrictive clause, is within the reason thereof, and within the intent of the legislature.<sup>2</sup> The over-issue of bonds is clearly within the restrictive clause; had the condition existed allowing the consolidation, it could have been exercised only subject to the restriction. "If this statute is broad enough to authorize the consolidation of these various corporations, a large portion of the railroads intersecting or diverging from the great railroads of this state may be embraced in a single corporation; such was not the intention of the legislature."

Court reviewing the facts and contracts summarizes same and concludes: "It is apparent that the design was to build the road by proceeds derived from the sale of the bonds." The capital did not represent cash, as it should have done, and the construction was dependent on bonds "resting mainly on a foundation no more substantial than the hopes or imaginations of the promoters; which method of railroad building has brought loss and discredit, and should not receive the approval of the courts in any case not clearly authorized by the statute."<sup>3</sup>

It is argued that the wrong must be one affecting the public at large and not private individuals alone; and that "neither the state nor the attorney-general is constituted the guard-

<sup>1</sup> Charles River Bridge v. Warren 26 Beav. 533-543; Pretty v. Solly, Id. Bridge, 11 Pet. 420; Auburn & Cato 606-610; Vorhees v. Bank, 10 Pet. 469; Plank Road Co. v. Douglass, 9 N. Y. Wayman v. Southard, 10 Wheat. 1-30; 444; Sedgw. Stat. & Const. L., 291. Minis v. United States, 15 Pet. 423.

<sup>2</sup> As to restrictive clauses, and provisions and exceptions, reference is made to Wilberforce on Statutes, 300 to 305, 290-293; Churchill v. Crease, 5 Bing. 180; DeWinton v. Mayor, etc.,

<sup>3</sup> The right to issue stock as full paid in payment for the construction of the road was established in Van Cott v. Van Brunt, 82 N. J. 735, reversing in effect 2 Abb. N. C. 283.



ian of public morals;" but sufficient authority for the action is found in the statute, and ample justification for the prosecution in the evidence.

#### SECTION FIVE.

**St. Louis, Vandalia & Terre Haute R.R. Co. v. Terre Haute & Indianapolis Ry. Co., 33 Federal Reporter, 440. <sup>1</sup>**

**Equity will not interfere with void lease where ejectment will lie.**

The complainant, St. Louis, Vandalia & Terre Haute Railroad Co., incorporated in Illinois, leased its road for 999 years to the defendant, the Terre Haute and Indianapolis Railroad Company, incorporated in Indiana. After the lease had run nineteen years the complainant brought a bill to cancel the same, and declare it void, as having been made without any legal power or authority, and to recover possession of the real estate included therein, and to quiet title thereto. The bill proceeded also upon the alternative that if the lease should be held valid, the complainant should have an accounting and recovery of earnings thereunder. Demurrer to bill sustained.

Opinion in full by GRESHAM, C. J.:

The complainant, the St. Louis, Vandalia & Terre Haute Railroad Company, was chartered by an act of the general assembly of the State of Illinois, approved February 10, 1865, to construct and operate a railroad from the bank of the Mississippi river opposite East St. Louis, to the eastern boundary of the State of Illinois, at a point most convenient for extending the same to the city of Terre Haute in the State of Indiana; and this charter was amended by an act approved February 8, 1867.

The defendant was chartered by an act of the general assembly of the State of Indiana, passed January 26, 1847, under the name of the Terre Haute & Richmond Railroad Company, with power to construct and operate a railroad from a point on the western line of the State of Indiana, easterly, through Terre Haute to Richmond, in the same state; and by an act passed March 6, 1865, the name of the defendant was changed to the name it now bears.

The bill avers that the complainant was not authorized by

<sup>1</sup> Affirmed : 12 S. C. R. 953.

its charter to part with the possession of its property and franchises indefinitely, or for a fixed period of time, by a lease or other contract; and that the defendant was not authorized by its charter to acquire, by like means, the possession, management or control of any railroad located beyond the limits of the State of Indiana, for an indefinite or fixed period; that, in order to secure money to construct and equip its road, the complainant, on April 6, 1867, executed a mortgage or deed of trust, dated January 1, 1867, conveying to trustees all its railway and equipment to secure the payment of bonds aggregating \$1,900,000, drawing interest at the rate of seven per cent per annum, in which instrument it was provided that beginning on July 1, 1872, there should be set apart and paid to a commissioner out of the earnings of the railroad, \$20,000 annually, as a sinking fund for the redemption of these bonds; that on March 13, 1868, the complainant executed its second mortgage or deed of trust, to secure the payment of an additional issue of bonds, aggregating \$2,600,000, drawing seven per cent interest; that these two issues of bonds were all sold, and the proceeds thereof applied to the construction and equipment of the railroad; that they are all outstanding and unpaid, and that no sinking fund has been created as provided in first mortgage; that on the 10th of February, 1868, the complainant executed a pretended lease of its railroad property and franchises to the defendant for the period of 999 years, which is set out in the bill as follows: (Given in full in the opinion.)

The bill further avers that on January 12, 1869, and after the bonds had been sold, as previously stated, the board of directors of the complainant adopted a resolution declaring that the defendant should be allowed seventy per cent out of the gross receipts, instead of sixty-five per cent, for operating the road, and that by agreement between the parties the lease should be modified only to that extent; that by a statute of the State of Illinois, in force at the time the pretended lease was executed, no railroad company in the State of Illinois was allowed to lease its railroad and other property and franchises to any foreign railroad company without having first obtained the written consent of all stockholders residing in that state, and that the pretended lease was executed without the written

consent of fifty-nine stockholders, who then resided in Illinois; that on the completion of the construction and equipment of the road, on July 1, 1870, the defendant took possession and control of the same, and from that time to the present has operated the entire property under the franchises granted to the complainant, and has received, in tolls and other earnings, more than \$21,600,000; that the pretended lease is void because neither the plaintiff nor the defendant was authorized by the states which created them to enter into such a contract; that the defendant is liable, as trustee, to account to the complainant for all the property embraced in the pretended lease, together with all receipts and profits derived from the management and operation thereof, and to restore immediately to the complainant the full control and possession of all its property and its earnings, after deducting reasonable disbursements, made by the defendant, in the care, management and maintenance of the same; that the defendant has refused to deliver to the complainant on demand, its property and the earnings derived therefrom; that during the entire period the defendant has been in possession of the railroad, it has failed to pay over to the complainant, according to the terms of the lease, the latter's full share of the gross receipts; that there is now due the complainant from this source, after the payment of interest which has accrued upon the mortgage bonds, more than \$500,000; that by reason of the defendant's failure to make such payments as they became due the complainant has been unable to create any sinking fund as required by the terms of the first mortgage; that the complainant entered into the contract supposing it had lawful authority to do so, but it has been recently advised by its counsel that it had no such power and that the lease is null and void, and that it is its duty to repudiate the same and resume possession of its property and franchises; that the complainant is liable to have its charter and corporate rights forfeited by the State of Illinois; that by the proper management the income of its property can be largely increased; that the present income is more than sufficient to pay the interest on its bonded indebtedness and create a sinking fund as required by the first mortgage, and that the first mortgage is liable to be foreclosed at any time on account of the failure to create such sinking fund.

The bill also avers that whether the lease be valid or void, an accounting is necessary to determine the amount of money received from the defendant in the operation of the road, which will require the examination of long and complicated accounts covering a period of seventeen years; that the pretended lease is a cloud upon the complainant's title to its property; that the defendant is daily withdrawing from the jurisdiction of this court large sums of money accruing from the operation of the road, which it will continue to do unless restrained by this court, or unless a receiver be appointed, *pendente lite*.

The prayer is that the lease be declared null and void; that the defendant be required to deliver to the complainant the possession of all property which it now holds under the lease; that the defendant be perpetually enjoined from disturbing the complainant in such possession; that an account be taken of all money received by the defendant, or which it might have received by proper management of the property, and that the defendant be required to pay to the complainant the earnings so found to have been received by the defendant as well as the fair value of any property not accounted for, less reasonable disbursements and expenses as already stated; and if the lease shall be held valid, an accounting be taken of the amount due under its terms, for the defendant, and that the complainant have a decree for the amount so found due.

The defendant demurs to the bill (1) because it discloses no equity; (2) because it is multifarious and contradictory, and (3) because the complainant has a complete remedy at law. Section 1 of an act of the Illinois legislature, approved February 12, 1855, reads:

"Section 1. That all railroad companies incorporated or organized under, or which may be incorporated or organized under the authority of the laws of this State, shall have power to make such contracts and arrangements with each other, and with corporations of other states for leasing or running their roads, or any part thereof, and also to contract for and hold in fee simple, or otherwise, lands or buildings in this or other states for depot purposes, and also to purchase and hold such personal property as shall be necessary and convenient to carry into effect the object of this act."

Section 1 of an act of the general assembly of the same state, approved February 16, 1865, reads :

“Section 1. That it shall not be lawful for any railroad company of Illinois, or for the directors of any railroad company of Illinois, to consolidate their road with any railroad out of the State of Illinois, or to lease their road to any railroad company out of the State of Illinois, or to lease any railroad company (*sic*) out of the State of Illinois, without having first obtained the written consent of all the stockholders of said company residing in the State of Illinois, and any contract for such consolidation or lease which may be made without having first obtained said written consent, signed by the resident stockholders in Illinois, shall be null and void.”

In 1874 the last named statute was repealed, and the act of 1855 was re-enacted, and on the eighth day of February, 1867, an act was passed amending the complainant's charter, section 13 of which reads :

Said company shall have power to consolidate and connect its railroad with any other continuous line of railroad now constructed or which may be hereafter constructed, either in this state or in the State of Indiana, upon such terms as may be agreed upon between the companies so connecting or uniting, and for that purpose full power is given to such company to make and execute such contract with any other company as will secure the object of said consolidation or connection.

On the twenty-third of February, 1853, the legislature of Indiana passed an act (Rev. St. §§ 3971, 3972), the first and second sections of which read :

“Section 1. Any railroad company heretofore organized under the general or special laws of this state shall have the power to intersect, join and unite its railroad with any other railroad constructed, or in progress of construction in this state or any adjoining state, at such point on the state line or at any other point as may be mutually agreed upon by said companies; and such railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint stock company of the two railroads, thus connecting upon such terms as may be by them mutually agreed upon in accordance with the laws of the adjoining state, with whose road or roads connections are thus

formed, provided their charter authorizes said railroad to go to the state line or to such point of intersection.

“Section 2. Any railroad, heretofore organized, or which may hereafter be organized, under the general or special laws of this state, for the purpose of constructing a railroad from any point within this state to the boundary line thereof, is hereby empowered to extend said railroad into or through any other state or states, under such regulations as may be prescribed by the laws of such state or states into, or through, which said road may be so extended, and the rights and privileges of said company over said extensions in the construction and use of said railroad for the benefit of such company, and in controlling and applying the assets of such company, shall be the same as if its railroad had been constructed wholly within this state.”

It is claimed that the Illinois statute of 1865 limited the power previously conferred upon railroad corporations of that state to consolidate or enter into leases with railroad companies outside of the state, and that the contract involved in this suit is void because the Illinois company made it without the written consent of the resident stockholders. The act of 1865 was repealed in 1874 when the act of 1855 was re-enacted, and from the last named date until this suit was brought, thirteen years, the defendant continued to hold and operate the road in Illinois under the contract with the complainant's consent. This recognition and performance since the re-enactment of the act of 1855, was enough of itself to conclude the complainant. If, after the repeal of the act of 1865, the contract had been re-executed, its validity under the laws of Illinois could not be questioned, and what was done subsequently to 1874 was referable to the contract and the act of 1855. A new agreement made after 1874 would have been no less binding, and even if the contract was invalid under the act of 1865, it is now too late for the complainant to say that it was made without authority and in violation of that act. But without reference to the act of 1855 and its re-enactment, and the subsequent action of the two companies, we hold that the written consent of all the stockholders residing in Illinois to a lease of an Illinois railroad to a company out of the state, was a provision inserted in the act of 1865 for the personal benefit of such



stockholders and one which they could, and in this case did, waive by long acquiescence. The silence of the stockholders for almost twenty years was equivalent to their written consent. Any resident stockholder might have enjoined the execution and performance of the contract by a suit brought in due time, but no such suit could be maintained after an acquiescence for the period stated, and no one but a stockholder could object to the contract on that ground. *Thomas v. Railway Co.*, 104 Ill. 462; *Taylor v. Railroad Co.*, 4 Woods 575; *Beecher v. Mill Co.*, 45 Mich. 103, 7 N. W. Rep. 695.

The relief sought by the complainant is inequitable, and against the rules which govern courts of conscience, and if the contract could not be sustained under the Illinois laws on any other ground we would feel authorized to hold that the word "void" in the act of 1865 meant "voidable." Prior to 1865, railroad companies in Illinois were expressly authorized to lease their roads to companies out of the state, and the provision in the act of the last-named date, which required the written consent of resident stockholders to give validity to such contracts, is no evidence of a change in the previous policy of the state. That the policy of Illinois favored such action by its own railroad corporations, abundantly appears from the public statutes and the decision of its courts. The act of 1865 is relied on as establishing a contrary policy. We do not think it does, but if it did that act was repealed in 1874.

If the defendant was not expressly authorized by the Indiana statutes to make the contract, it was not in terms prohibited from doing so, and it follows that if the contract is void it is so on the sole ground that its execution by the defendant was impliedly prohibited by the laws of its domicile. We hazard nothing by saying that a judgment of an Indiana court forfeiting the defendant's franchises for no other reason than the making and performing of this contract would startle the bar of that state. In *Branch v. Jesup*, 106 U. S. 468, 1 Sup. Ct. Rep. 495, the Supreme Court of the United States held that a grant of power to a railroad company to consolidate included the lesser power to sell its road or buy another road, and that the power to construct a railroad included the power to purchase a railroad and pay for the same by an issue of its own stock. The power to consolidate was expressly given to

the defendant by the first section of the Indiana act of 1853, and by the thirteenth section of the Illinois act of 1847 the same power was expressly granted to the complainant, and treating the contract either as a sale or lease, we are unable to see why it was not valid under the ruling in the case just cited. *Manufacturing Co. v. Bank*, 119 U. S. 191; 7 Sup. Ct. Rep. 187; *Branch v. Atlantic, etc.*, 3 Woods 481; *Darling v. Rogers*, 22 Wend. 486.

It is urged with earnestness by counsel for the defendant that the second section of the act of 1853 expressly authorized that company to extend its road from the state line into or through the State of Illinois, under such regulations as the latter state might prescribe, and that regulations for such extension were prescribed by the Illinois statutes, and further that the two roads, meeting as they did at the line dividing the two states, the defendant was expressly authorized by the Indiana statute to make the contract with the complainant for the use of its road in Illinois. But for the decision of the Supreme Court of the United States in *Railroad Co. v. Railroad Co.*, 118 U. S. 630, 7 Sup. Ct. Rep. 24, we might yield to the force of this argument. That was a suit brought by an Illinois railroad company against an Indiana railroad company and corporations of other states, to enforce a lease, and for other relief. The Illinois corporation owned a line of railroad extending from the Mississippi river, opposite St. Louis, to Terre Haute, Indiana, twelve miles of the road being in the latter state. By the terms of the lease the Indiana company acquired the right to hold, maintain and operate for the Illinois company its line of road, equipment and franchises for a term of ninety-nine years, and pay therefor a prescribed annual rental. The Supreme Court of the United States held that the lessor, the Illinois company, was authorized by the Illinois act of 1855 to make the lease, but that the Indiana act of 1853 did not authorize the Indiana company to accept the lease, and it could not, therefore, be enforced against the Indiana company; that the powers of corporations organized under legislative authority were such, and such only, as were expressly conferred or plainly implied; that the enumeration of powers granted implied the exclusion of others, and that unless expressly authorized by its charter or aided by some other legis-



lative action, a railroad company could not, by lease, or any other contract, turn over to another company for a long period of time its road and all its appurtenances, the use of its franchises and the exercise of its powers, nor could any other railroad company, without similar authority, make a contract to receive and operate such road, its franchises and property, and that such a contract was not among the ordinary powers of a railroad company, and was not to be presumed from the ordinary grant of powers in a railroad charter.

If the Indiana act of 1853 did not authorize the Indiana corporation to accept the lease which was involved in that suit, it did not authorize the defendant to bind itself by the instrument now in suit, whether it be a lease "or any other contract;" and although *Branch v. Jesup* is not expressly overruled by the case last referred to, and we are not convinced that it was intended to be overruled, we nevertheless feel obliged to hold that the defendant had no power under the Indiana act to make the contract involved in this suit, and that it is void as to the defendant for that reason, alone. It does not appear from the bill that by making the contract and operating the road in Illinois, the defendant had deprived itself of ability to successfully operate its own road in Indiana, or that it had neglected any duty that it owed to the latter state, or its own stockholders. On the contrary, for anything appearing in the bill, the defendant has been benefited by the contract, and its performances.

It being settled, then, that the laws of Illinois authorized both corporations to execute the contract and perform it in that state, and that the laws of Indiana conferred no such authority on the defendant, and that the contract is therefore void as to the latter, can this suit be maintained? The invalidity of the contract is not relied on here as a defense to a suit for its enforcement, as was the case in *Railroad Co. v. Railroad Co.*, and *Thomas v. Railroad Co.*, 101 U. S. 71, and indeed, in most, if not all, of the cases cited in support of the bill. It is urged that if the laws of Illinois authorized the contract, and the laws of Indiana did not, it is void as to both companies because they both acted illegally in making it. Is a railroad company entitled to affirmative relief in a

court of equity against its own illegal acts, and that too, without regard to *laches*?

It is well settled that a corporation may plead as a defense to a suit upon a contract that it is against public policy or good morals, or that it is expressly prohibited by law, or impliedly prohibited because not authorized by its charter or any other legislative authority.

But it does not follow that because such defenses are sustained, that a court of equity will in all cases annul an illegal contract at the suit of a party to it. Stockholders who act with reasonable promptness may enjoin the execution and performance of illegal agreements and acts, but it is believed that few, if any, well considered cases can be found in which affirmative relief has been granted to one of the wrongdoers. In *Spring Co. v. Knowlton*, 103 U. S. 49, it was held that a party to an executory contract not *malum in se*, but prohibited by law, might recover back money which he had advanced under it to the other party who had performed no part of the agreement. Assuming that the contract now under consideration is executory, it can not be said it has not been performed in part by the defendant. It is not claimed that interest on the complainant's outstanding bond is due and unpaid, or that the defendant is insolvent. No complaint is made by the defendant or any stockholders of either corporation against the contract. No such complaint is made by the State of Illinois or the State of Indiana, nor is it seriously believed that either state ever will make such complaint, and yet we are told that because the contract is executory and continuing, and was made by both companies, certainly by the defendant without legislative authority, the court must annul it under the rulings in *Railroad Co. v. Railroad Co.*

We do not think that the Supreme Court of the United States, by that case, meant to establish principles for the guidance of courts of equity at variance with the current of its decisions. So far as this suit seeks to annul the contract, it might have been brought eighteen years ago, for the agreement was invalid from the beginning; and if it be true that such a suit may be brought at any time before the contract expires by its own terms, *laches* being no obstacle to relief, the complainant might have delayed for an hundred years more without injury

or prejudice to its standing in a court of equity. See *Trust Co. v. Midland Co.*, 117 U. S. 437; 6 Sup. C. Rep. 809.

Equity relieves suitors who are diligent, and remits to their legal remedies those who have slept upon their rights, and this is done although the suitor's equitable right may otherwise be apparently perfect. It is not so in courts of law. There the suitor may wait until the day before his right of action is barred by the statute of limitation. The defense of *laches* goes to the remedy, rather than to the right.

In refusing affirmative relief on the ground of negligence, a court of equity does not adjudicate against the right asserted in the bill. It simply holds that the complainant is not entitled to the particular remedy sought. "Nothing," said Lord Camden, in *Smith v. Clay*, Amb. 645, "can call forth this court into activity but conscience, good faith and reasonable diligence. When these are wanting the court is passive, and does nothing. *Laches* and neglect are always discountenanced." Decisions of the Supreme Court of the United States and other courts need not be cited in support of this doctrine.

By this suit the complainant seeks to recover possession of real estate, and quiet its title to the same.

Ejectment is a legal and not an equitable remedy, and the action will lie to recover the possession of a railroad. *Railroad v. Johnson*, 119 U. S. 608; 7 Sup. Ct. Rep. 339.

The bill can not be sustained as a bill *quia timet*, the complainant being out of possession, and the defendant in possession. *Frost v. Spitley*, 121 U. S. 556; 7 Sup. Ct. Rep. 1129.

The Illinois statute of 1869 (Starr & C. St. 419) authorizes the court to hear bills to quiet title, and to remove clouds from the title to land, whether improved or occupied or unimproved or unoccupied, and declares that the taking possession of such land after the commencement of suit by the party who claims title adversely shall not affect the complainant's right to relief. This statute does not authorize suit by a party out of possession against a party already in possession under a claim of adverse title as in this case. Finally, is the bill multifarious or contradictory? We think it is. It contains two distinct grounds of suit, one for the rescission of the contract on the theory that it is void, and the other for the accounting and a recovery of earnings, on the theory that it

is valid. The averments that relate to the first ground of relief are wholly irrelevant, if the bill be considered simply as a bill for an accounting. It is true that a complainant may state the fact of his case, and ask relief according to the conclusion of law which the court may draw from them, although this may be presented in two or more alternatives (Story Eq. Pl. § 42), but this is not such a case.

A bill to annul a contract for fraud or illegality, and to specifically enforce it, if the court shall hold that it is valid, is fatally defective, and we can see no substantial difference between such bill and the one now before us. *Shields v. Barrow*, 17 How. 130, was a suit to set aside an agreement for fraud, and an amendment to the bill was allowed praying specific performance. In delivering the opinion of the court, JUDGE CURTIS said: "So that the bill thereafter presented not only two aspects, but two diametrically opposite prayers for relief, resting upon necessarily inconsistent cases; the one being that the court would declare the contract rescinded for imposition and other causes, and the other that the court would declare it so free from all exception as to be entitled to its aid by a decree for specific performance. \* \* \* A bill may be originally framed with a double aspect, or it may be so amended as to be of that character, but the alternative cases stated must be the foundation for precisely the same relief."<sup>1</sup>

The demurrer is sustained.

## SECTION SIX.

**Tuttle v. Mich. Air Line Co., 85 Mich. 247.**

**Subscriber released by defective consolidation.**

Suit by the Michigan Air Line Railroad Company, to recover from defendant the amount of stock by him subscribed to "The Grand Trunk Railway Company of Michigan," which was organized December 21, 1866, consolidated August 28,

<sup>1</sup> Decree was affirmed in Supreme its aid. Elaborate opinion, with citation of numerous authorities in 12 Court, chiefly on the ground that plaintiff was *in pari delicto* with defendant, and equity would not lend S. C. R. 953.

1868, with an Indiana corporation, forming a corporation called Michigan Air Line Railroad Company, which was again consolidated without change of name October 8, 1870, with the St. Joseph Valley Railroad Company. Defendant insisted that he was not bound by the various consolidation proceedings. It was urged that the last corporation was one *de facto*, and hence defendant should not deny the legality of its existence, but it is held that he may do so. His contract was with a company which was to confine itself to certain parts of Michigan; he can refuse to be brought into any other contract relation not contemplated by the contract itself; the contract referred to the statutes then in force or as they might be amended. No change in the corporation which violated any of the substantial statutory conditions could bind a dissenting stockholder, or compel him to submit to the new order of things against his will.<sup>1</sup> The statutes upon consolidation<sup>2</sup> required the directors of the several roads to make an agreement, and that agreement was then to be confirmed by the stockholders.

No such agreement preceded the first consolidation; there was an agreement signed by the presidents and secretaries, but none by the directors. Such agreement was made preceding the second consolidation, but no notice was ever given to the stockholders to meet and consider it. The statute requires an actual agreement by the directors to be ratified (and not a mere proposition to be accepted) by the stockholders. Neither of the notices calling together the stockholders of the respective companies was published thirty days as required by the statute.<sup>3</sup> At common law all notices were required to be personal, unless otherwise fixed by the by-laws, and notice by publication or by mail would be nugatory;<sup>4</sup> the notices were defective in not giving sufficient detail as to time, place and object. In such very important matters the notices should certainly be as explicit as the notices required for other meetings. Defendant is not a member of the corporation which is now prosecuting him, and it has no claim upon him.

<sup>1</sup> Mansfield, Coldwater & Lake Michigan R. R. Co. v. Drinker, 30 Mich. R. 124. <sup>2</sup> C. L. of 1871, Sec. 2346; L. of 1873, p. 522.

<sup>3</sup> Mich. R. 124.

<sup>4</sup> Ang. & A., Sec. 492; Burhans v.

<sup>5</sup> Section 50, General Law of 1855. Corey, 17 Mich. 282.

SECTION SEVEN.

**The Mansfield, Coldwater & Lake Michigan Railroad Company v. William Brown et al., 26 Ohio St. 223.**

**Consolidation is not complete until directors are elected, and they can not be legally elected until articles are filed with secretary of state.**

Defendant, when subscribing to the stock of a corporation, is bound to know that the same has the power, under the statute, of consolidating with another, and the statute becomes as much a part of the contract as though written therein.<sup>1</sup>

Said corporation thereafter did consolidate with another and thus formed the plaintiff corporation, which is held to have thereby succeeded to all the rights of the prior corporations.

The plaintiff's succession to the property of the prior companies, however, does not fully arise until it elects its first board of directors: "Upon the election of the first board of directors of the corporation created by said agreement of consolidation, and by the provisions of this act, all and singular the rights, privileges and franchises of each of said corporations, parties to the same, and all the property, real, personal and mixed, and debts due on account of subscriptions of stock or other things in action, shall be deemed to be transferred and vested in such new corporation without further act or deed." \*

<sup>1</sup> But he is not bound by a consolidation which is illegal, as for instance by a corporation, the road of which is not then, as by statute it should be, "made or in progress of construction." Same plaintiff v. Stout, 26 Ohio State 241.

That the state and not the defendant should raise the objection, there are cited Bartholomew v. Bentley, 1 Ohio St. 38; Frost v. Frostburg Co., 24 How. 278; 22 Cal. 434; Cochran v. Arnold, 58 Pa. St. 399; 26 N. Y. 77; 2 Greenl. 404; 7 Pick. 344.

That the subscriber can not be compelled to embark in a different enterprise from the one to which he subscribed, there are cited Marietta v. Elliott, 10 Ohio St. 57; Chapman v. M. R. Co., 6 Ohio St. 119; Kean v. Johnson, 1 Stock. Ch. 401; Kenosha v. Marsh, 17 Wis. 13; Everhart v. West, etc., Co., 28 Pa. St. 339; Oldtown v. Veazie, 39 Maine 571; 2 Redf. on Railw., 5th Ed. 587-589, Sec. 252 and notes; 77 Porter (Ind.) 407; 9 Ind. 358; 10 Ind. 93; 12 Ind. 605; 13 Ind. 387; 16 Ind. 46. It is questioned whether the subscriber can be compelled to come into the consolidation though the statute allowing consolidations exist at the time he subscribes. Zabriskie v. Hackensack, etc., Co., 3 C. E. Greene 178; Oldtown, etc., v. Veazie, 39 Maine 571.

\* Act of April 10, 1856, 53 Ohio L. 143; amended May 6, 1869, 66 Ohio L. 127.

Plaintiff fails to show that it ever legally elected a board of directors; the election shown was prior to the time of the filing of the consolidation agreement with the secretary of state; hence, it was at a time when the consolidated corporation had, as yet, no existence, and therefore the election was premature and ineffective.

Plaintiff has failed to prove its right to recover.

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#### SECTION EIGHT.

**Stokes v. The Phelps Mission et al., 47 Hun (N. Y.) 570.**

**Denominational church and a charitable society under free church act can not be consolidated.**

Complaint by a member of the "Phelps Mission," a body corporate, against the trustees of the Eighty-fourth Street Presbyterian Church and others, to prevent the consolidation of said mission and said church, and the transfer of all of the former's property to the latter by virtue thereof. Demurrer sustained to complaint below, but reversed on appeal and complaint held good.

The plan seemed intended chiefly to deprive the Phelps Mission of its property and turn it over to the church, pastor of which was one of the trustees of the mission, and mainly instrumental in bringing it about and interested wholly in the church, while also trustee of the mission; this would of itself be sufficient, if no other ground existed, to invalidate the whole proceeding. The principle that corporations having common officers and trustees can not enter into valid contracts with each other, has become well established in the jurisprudence of this country and in England<sup>1</sup> and needs no elaboration here. Each corporation has the right to the unbiased counsel of each of its officers and trustees; and where an officer or trustee is connected with two different corporations, each, in any dealings between the two, will be deprived of that to which it is entitled, viz., the unbiased aid and counsel of such trustee; and therefore they must not contract, and if they do so, such con-

<sup>1</sup> Metropolitan Elevated Ry. Co. v. Manhattan Ry. Co., 11 Daly 373, and cases there cited.



tract will be set aside at the instance of any party having the right to call the transaction in question.<sup>1</sup>

There is also another difficulty. The Mission was incorporated<sup>2</sup> for the purpose of founding a free church, and can not consolidate with the church, incorporated<sup>3</sup> as a religious society; for the several acts<sup>4</sup> under which consolidation is provided for, when examined carefully and all construed together, relate throughout to denominational corporations, hence do not embrace the Mission, which is not such a one. Even if the Mission be deemed a religious society—as has been a missionary society<sup>5</sup>—yet it is not a denominational one. The organic differences between the corporation of a church under denominational control and a charitable society organized under the free church act, are so striking that the property of the latter should not be allowed to be diverted from the uses to which it was intended to be devoted by its donors, to the support of an organization so essentially distinct and different.<sup>6</sup>

#### SECTION NINE.

**In re Era Insurance Society**, 9 Week. Rep. 67; S. C., 80 L. J. (N. S.) 187.

#### Sundry instances.

Insurance companies can not amalgamate unless such power is reserved in the deeds of settlement. A shareholder can not have another company's debts thrown on him without his consent.

The members must affirmatively consent. Statute directed that the consolidation of three mutual insurance companies was not to take effect until accepted by the members at meetings to be called for that purpose. Meetings were held and resolutions of acceptance adopted. Plaintiff was not present, hence he did not become a member of the consolidated company, and has no claim against it for loss by fire. *Gardner v. Hamilton Co.*, 33 N. Y. 421.

<sup>1</sup>For full discussion of effect of same persons being officers in each of the contracting corporations, see section 658, Cook on Stock and Stockholders, 3d Ed.

<sup>2</sup>Laws of 1854, Ch. 218.

<sup>3</sup>Under Act of 1818.

<sup>4</sup>Acts of 1813 and 1876.

<sup>5</sup>*Stephenson v. Short*, 92 N. Y. 446.

<sup>6</sup>Equity is held appropriate although parties in interest have the right to be heard in the supreme court in opposition to an application for consolidation. *Maclaury v. Hart*, 10 N. Y. Supp. 125.

## CHAPTER VII.

## IDENTITY OF THE SUCCESSIVE CORPORATIONS.

Corporations acquiring a unity of interests and merging their committees, officers, subscribers and their operations into one joint enterprise do not on that account cease to exist as distinct and different corporations; as such they continue to act within the spheres of their respective charters for purposes of common interest.

There may be a union of interests and of stocks without the surrender of personal identity or corporate existence.

Legislative recognition may identify the consolidation to be the same entity as the prior corporation, or may preserve a corporate continuity by placing the consolidation in the place of the original corporation; a change of name and acquisition of new rights do not necessarily make a new person, nor does the substitution of a new set of stockholders.

The original corporation remains in existence for purpose of suit upon its own debts, and may be sued in the new name acquired by reason of the consolidation. After consolidation, the old company exists under a new name and with enlarged powers.

The test in all cases is to be found from the facts and circumstances, terms of contracts, texts of statutes, intent of parties; from these it must be determined whether the original companies passed out of existence, or remained under a new name and management with enlarged powers.

## SECTION ONE.

**Farnum v. Blackstone Canal Corporation, 1 Sumner, 46.**

**Constituents preserve their identities.**

Bill in Federal Court, Rhode Island, by the owners of a cotton mill against the Blackstone canal corporation, to compel it to lower a dam which was causing the water to back into the mill. Injunction granted. Opinion by Story, J.

Defendant attempted to justify under certain charter and other acts of incorporation. In June, 1823, the legislature of Rhode Island incorporated a company by the name of the Blackstone Canal Company, with power to construct a canal upon a certain route in Rhode Island; and (inasmuch as there was a Massachusetts company incorporated for the purpose of constructing a canal in that state) it was also provided by the Rhode Island acts that the incorporation, with the assent of the Massachusetts corporation, might authorize subscription for stock to be opened for the entire route from Worcester, Mass., to Providence, R. I., "and all officers and committees chosen by said subscribers should be officers of this corporation; and all books and records kept under the authority and direction of such subscribers, and all meetings, regular or special, whether in Rhode Island or Massachusetts, should be deemed and taken, to all intents and purposes, to be legal proceedings by this corporation." It was also declared that the stockholders in the Massachusetts Blackstone Canal Company should be stockholders in the Rhode Island Company, as if they had originally subscribed thereto, if both corporations should, before the first day of July next, agree thereto; and that the books and proceedings of the original and associated stockholders should be deemed the books of both corporations; analogous and reciprocal acts were passed in Massachusetts; the two corporations became thus united by an acceptance of the terms of those acts, one accepted June 25, 1827, the other December 26, 1827; all antecedent acts must be deemed to have been done by the respective corporations under their respective and distinct acts of incorporation.

Following is the opinion in full so far as relates to the topic of identity of the successive corporations:

"We may, then, turn to the Massachusetts acts of incorporation, and inquire whether they justify the raising of Woonsocket dam, and the flowing back of the waters upon the plaintiff's mill. The original act of incorporation by Massachusetts, was passed in January, 1823; and it incorporated certain persons named therein, by the name of the Blackstone Canal Company, with the usual powers of bodies politic, authorizing them to construct a navigable canal, etc., etc., commencing in or near the village of Worcester, down the valley of the Blackstone river in a direction toward tide-waters, to

the boundary line between the States of Rhode Island and Massachusetts. By the eighth section, the corporations were authorized after location of the canal, or any part thereof, to report their doings to the Court of Sessions for Worcester County, describing the route, width, towpaths, embankments, basins, wharves, excavations and reservoirs, and the owners of the lands, so far as they could be ascertained. Notice thereof was to be given by the court, and the commissioners were to be appointed by the court to assess the damages to the owners of the land, with a reservation of a right of trial by jury to all persons dissatisfied with the report of the commissioners, otherwise the report, upon being accepted by the court, to be conclusive. Remedy was also provided for cases of non-payment of the damages so assessed. Power was also given to alter the route or location of any part of the canal. The other provisions of the act are not material to be stated.

By an act passed on the 7th of February, 1824, the Massachusetts legislature further authorized the Massachusetts company to open books for subscriptions of stock, to construct a canal from Worcester to tide-water in town of Providence, in Rhode Island, and create, if necessary, new stock for the purpose. And the new subscribers were declared to be members of the corporation, and the corporation was authorized to expend the funds raised by the new stock on any part of the canal.

By an act of the 4th of March, 1826, the legislature of Massachusetts further authorized the commissioners appointed by the eighth section of the act of incorporation, "to appraise all damages accruing to any person or persons, corporation or corporations, by reason of flowing his, her or their land by said canal company, for their use; also to appraise all damages accruing to any person or persons, corporation or corporations, by the reason of the detention or diversion of any water from said person or persons, corporation or corporations, who may have a legal right to the same," with a proviso, that the claim for damages should be filed in the Court of Sessions for Worcester, within one year from and after the flowing, detention or diversion as aforesaid, otherwise they were to be barred.

By an additional act, passed on the 20th day of February, 1827, it was enacted that, after the first day of July then next, the stockholders in the Blackstone Canal Company in Rhode Island, and incorporated by that state, should be constituted

stockholders in the Blackstone Canal Company created in Massachusetts, with the powers, rights, and privileges of the original subscribers. Other auxiliary provisions were made; but the union of the two corporations was to take place only upon the acceptance of the provisions by each corporation under the authority of the respective legislative acts of each state. In pursuance of the legislative acts of each state the two companies became thus united by an acceptance of the terms of those acts, the Rhode Island corporation having agreed thereto on the 25th of June, 1827, and the Massachusetts corporation on the 26th of December, 1827. The union, then, not being complete until the last mentioned period, it follows that all antecedent acts done must be deemed to have been done by the respective corporations under their respective and distinct acts of incorporation. This view of the matter would, therefore, exclude (if no other difficulty existed) all right to consider the acts done in virtue of the reports made to the Court of Common Pleas of Providence County in May, 1826, and in August, 1827, as being of any validity, as acts of the Massachusetts corporation, or as done with assent or co-operation of the latter.

Although, in virtue of these several acts, the corporations acquired a unity of interests, it by no means follows, that they ceased to exist as distinct and different corporations.<sup>1</sup> Their powers, their rights, their privileges, their duties, remain distinct and several, as before, according to their respective acts of incorporation. Neither could exercise the rights, powers or privileges conferred on the other. There was no corporate identity. Neither was merged in the other. If it were otherwise, which became merged? The acts of incorporation create no merger, and neither is pointed out as survivor or successor. We must treat the case, then, as one of distinct corporations, acting within the sphere of their respective charters for purposes of common interest, and not as a case where all powers of both were concentrated in one. The union was of interest and stocks and not a surrender of personal identity or corporate existence by either corporation.

<sup>1</sup> Note to this case, No. 4675 Fed. C. R. 1008; *Chase v. Sutton*, 4 Cush. 164; *Fitzgerald v. M. P.* 164; *Racine v. Farmers, etc.*, 49 Ill. Ry. Co., 45 Fed. 815; *Nashua, etc.*, 849. *v. Boston, etc.*, 186 U. S. 875, 10 S.

Let us see, then, how far the raising of Woonsocket dam in Rhode Island was authorized by the Massachusetts acts of incorporation. Now, the general rule certainly is, that every legislative act ought to receive a reasonable construction; and it can not be presumed, that a legislature authorizes any act to be done in a foreign territory, when that act is beyond the reach of its proper jurisdiction or sovereignty. Every legislature, however broad may be its enactments, is supposed to confine them to cases or persons within the reach of its sovereignty.<sup>1</sup> Unless, then, there is on the face of the Massachusetts acts some plain clause authorizing the raising of this dam, it can not be implied from the ordinary language of those acts. It can not be presumed, that the Massachusetts legislature meant to exceed its legitimate authority. The original act of incorporation in 1823, is manifestly confined to objects and purposes connected with the construction of a canal from Worcester to the Rhode Island boundary line. The raising of the Woonsocket dam was not included within the scope of that canal. It was not within the termini of it.

The supplementary act of February, 1824, does not change or enlarge this purpose; but only authorizes the subscription and sale of new stock to be made, and the application of these new funds to the making of any part to the canal from Worcester to tide-water in Providence. It does not authorize the corporation to construct such a canal beyond the territorial limits of Massachusetts; but only provides that any application of its new funds, for such a purpose, shall not be deemed a maladministration or malappropriation of them. The subsequent union of the two corporations in point of interest and stock does not, as has been already stated, vary this result.

The only reports of locations of the canal made to the Court of Sessions for Worcester County, under the authority of the Massachusetts acts, are as follows: First, a report made to the court at November term, 1825, and finally acted upon, with the proceedings thereon, at September term, 1826, by which "so much of the location and report as relates to a dam to be constructed on the top of a dam now belonging to the Blackstone Manufacturing Company, across the Blackstone River in the

<sup>1</sup> Note at No. 4675 Federal Cases, *yoke v. Conn. R. Co.*, 20 Fed. Rep. 79; cites *Bank v. Earle*, 13 Peters 519; *City v. West*, 22 Ind. 510; *Salisbury Runyan v. Coster*, 14 Peters 122; *Hol- v. Forsaith*, 57 N. H. 131.



town of Mendon, and now used by the said company," was allowed, accepted, and recorded. This report does not in the slightest degree touch any question as to raising Woonsocket dam. Secondly, a report of locations made to the court at December term, 1826, and finally, with the proceedings thereon, acted upon at March term, 1827, by which, among other things, the canal was laid out and located through the defendant's land to the boundary line between Massachusetts and Rhode Island. And here, again, no mention occurs of any raising of Woonsocket dam, or of any damages for flowage to be estimated therefor.

So that in point of fact, supposing that under the Massachusetts acts Woonsocket dam might have been located and raised, and the compensation ascertained for any flowage occasioned thereby, in the manner pointed out by those acts (which is admitted only for the sake of argument), no such location has been made and confirmed, and no such compensation ascertained and fixed, as these acts require to give validity thereto. There is, then, a total failure of any one execution of the proper authorities (supposing them to exist), to justify the raising of Woonsocket dam by the defendants, under the Massachusetts acts. In fact, that dam was not (as has been already stated) raised until August, 1828, and even if the union of the two corporations in December, 1827, were as complete and perfect as the defendants contend, so as to constitute thereafter a single corporation, still there is no legal location thereof by the corporation, confirmed by any court of Massachusetts, either before or subsequent to that period, which gives any legal validity in point of property or right to the raising of Woonsocket dam.

It appears to me, then, upon this short view of this part of the case, that the defendants have not shown any justification under the Massachusetts acts; and they pretend to none under the Rhode Island acts."

Facts are then reviewed and conclusion reached that the Rhode Island corporation had no authority under the Rhode Island acts to raise the dam in question, indeed, none such was claimed; and that the authority, if any existed under the Massachusetts acts, had not been legally exercised in reference to the location, reports of commissioners, appraisement of damages, giving notice, etc.



## SECTION TWO.

**United States v. Southern Pacific Ry. Co.; United States v. Colton Marble and Lime Co., 45 Federal, 596.**

**Identity of the successive corporations: referred to by statute as being the same.**

The Southern Pacific Railroad Company was incorporated under the laws of California of 1861, page 607, which also allowed companies to amalgamate and consolidate their capital stock; thereafter this company and three others availed themselves of that law and filed articles and consolidated themselves into a new corporation called "Southern Pacific Railroad Company." Congress, in mentioning this last corporation had in at least two instances referred to it as the same, or "said" Southern Pacific, which had been named in the land grant acts passed prior to the consolidation; hence it is decided that this last corporation is entitled to lands embraced in said grant.

While by the several articles of amalgamation and consolidation, a new corporation in one sense was formed, each was substantially and practically the same Southern Pacific Railroad Company mentioned in the acts of Congress, and had for its main purpose the building of the lines of railroad therein designated and the obtaining of the land grants for doing so. The defendant had in several ways been recognized as being the same company as the one to which the land grant had been made; it had been recognized by the appointment of commissioners, by its acceptance by the president and by its use by the government. "Manifestly the defendant company can not justly be held subject to the burdens imposed by the act and yet not entitled to the benefits conferred by it as a consideration for those burdens."

## SECTION THREE.

**John Hancock M. L. I. Co. v. Worcester, N. & R. R. Co., 21 N. E. 864; 149 Mass. 214.**

**The statutes contemplate a continuity of legal person.**

Plaintiff was the owner of bonds in the Nashua & Rochester R. Co., guaranteed by the Worcester & Nashua R. R. Co., with

the right to convert them into stock of the former corporation at par after the completion of the road. The road was completed, and thereafter the two companies were, by act of legislature, consolidated into one with a different name—Worcester, Nashua & Rochester R. Co. Plaintiff demanded of the new company that it issue stock for the bonds. The argument was made in defense that there had been no agreement by the old company that it would continue in existence, and that it had in fact passed out of existence and consequently could no longer issue stock. The court, however, decides that whether this be so or not, the new company was, by the statute of consolidation, made subject to all the duties, restrictions, obligations, debts and liabilities of the old companies, and all claims and contracts against either of these were made obligatory upon the new; hence it follows that whether the plaintiff could demand stock in the new company is immaterial, as it could and did demand it from the old, and the demand not being complied with, subjected the old company to damages, and these damages became a charge upon the new company. “It is usual for consolidating statutes to introduce more or less of the element of succession or continuity of legal person as to existing rights and duties, notwithstanding that in other respects the old and new corporations are not the same. It is for the legislature to say how far the new corporation shall be, as it were, the heir, executor or continuer of the old.”

#### SECTION FOUR.

**Day v. Worcester N. & R. R. Co., 23 N. E. 824; 151 Mass. 302.**

**Same topic continued.**

This case re-affirms and strengthens the ruling in the last case; and says that the very point decided was that the Nashua & Rochester R. Co. had not ceased to exist, and that the defendant, the W. N. & R. R. Co., was the same company (as said N. & R. R. Co.) but under a different name. “A change of name, an acquisition of new property or rights, or both together do not necessarily make a change of person.”

## SECTION FIVE.

**Island City Savings Bank v. Sachtleben, 3 S. W. 733; — Texas --.**

**Substituting a new set of shareholders does not change the corporate entity.**

Island City Savings Bank being insolvent, and under numerous attachments, etc., all its depositors, except the plaintiff, agreed to accept seventy-four per cent in full of their deposits. This amount was to be paid from the assets of the bank, to which \$20,000 had been added by subscriptions among the citizens. This composition was carried out, cash and notes were given to all the creditors, except the plaintiff, for said seventy-four per cent. Thereupon several persons associated themselves, by what manner of organization is not shown, and called themselves "Island City Savings Bank," and to this organization the insolvent bank transferred all its assets, including its name and franchise, and agreeing to pay back to the new association whatever it might be compelled to pay in excess of said seventy-four per cent, and the new association agreed to pay that amount for the old association.<sup>1</sup>

The new association continued in the same office, under the same name, used the same seal and claimed the franchises of the old; the teller was the same; the cashier of the old died, and hence there was a new cashier; the evidence does not show as to the other officers. The plaintiff never consented to take the seventy-four per cent, and demanded from the new association the amount of his deposit in full. It is held that he can recover. An insolvent bank may of course transfer its assets to a new organization, which might continue a similar business, and have some or more of the stockholders or officers of the former company and yet not be liable for the debts thereof.<sup>2</sup> But such is not this case; here the old shareholders agree with a new set of shareholders that the latter are to take the for-

<sup>1</sup> Incorporated by special law of June 20, 1870, charter amended Dec. 1, 1871, and June 3, 1873.

<sup>2</sup> A new corporation assuming the name of a former one and buying all its property is not identical with the former one. *Huggins v. Milwaukee Brewing Co.* (Washington), 39 Pacific R. 152.

But a new corporation formed of the same stockholders as the old, and only for the purpose of taking a deed to its land, and then suing in a federal court where the old one could not, is identical with the other. *L. M. & M. Co. v. Kelley*, 64 Fed. Rep. 401.

mer's place; the bank remains the same; the old name, seal and franchise are used; no new charter could have been obtained under the new constitution of the state for the purpose of doing a banking business. It is uniformly held that a corporation is not dissolved by the mere fact of becoming insolvent, not even in New York, where, by statute, inability to pay debts and suspension of business shall be deemed a surrender of its franchises.

The court says a surrender will not be presumed as long as it has power to continue or resume its business.<sup>1</sup> There was therefore merely a change in the membership and not in the corporation; thus in another case the defendant had been organized in March, and in June following the stockholders agreed to consider the first organization illegal and to reorganize; they did so; plaintiffs were creditors and stockholders of the old, and also took stock in the new corporation, and were held entitled to recover their debts of the corporation as newly organized.<sup>2</sup> The principle is that the artificial person (the body corporate) remains the same, and can not divest itself of its liability by a change of membership or a reorganization.

### SECTION SIX.

**Columbus, Chicago & Indiana Central Ry. Co. v. Skidmore, 69 Ill. 566.**

**The old company is sued under the name of the consolidation.**

Assumpsit to recover upon two promissory notes belonging to plaintiff, made by the Chicago & Cincinnati Railroad Company, which company, the declaration alleges, passed through several successive consolidations with other companies, and finally became consolidated with the defendant, viz., Columbus, Chicago & Indiana Central Railway Company.

Judgment for plaintiff affirmed. The only question made, so the court says, is as to the competency of the certificates of the secretary of state to prove the several articles of consolidation. These are held sufficient. Copy of articles of consolidation is required to be filed with the secretary of state;<sup>3</sup>

<sup>1</sup> *Bradt v. Benedict*, 17 N. Y. 98;    <sup>2</sup> *Longley v. Longley Stage Co.*, 23 *Brinckerhoff v. Brown*, 7 Johns. Ch. Me. 39.

217; *Mickles v. Rochester City Bank*,    <sup>3</sup> *Session Laws 1854*, p. 9.  
11 *Paige* 118.

thus they become records of that office, and hence copies thereof, certified by the secretary of state, are receivable in evidence by statute,<sup>1</sup> and would also be on general principles.

What the effect of the several consolidations is, is not before the court; the court goes no further than to say that the defendants are estopped from denying the name by which they are sued, and that the old company executing the notes by the name then used, has, by force of the consolidation, assumed the name by which it was sued.

### SECTION SEVEN.

**Meyer v. Johnston & Stewart, 64 Ala. 603.**

**The old company exists under a new name and with enlarged powers.**

Bill to foreclose railroad mortgages. Extended contracts and acts of legislation are reviewed, and the conclusion reached that the two original Georgia companies were dissolved and merged in the Alabama company, then known as the Alabama & Tennessee River Railroad Company, which was continued in existence, but with enlarged powers and extended franchises, under the name of the Selma, Rome and Dalton Railroad Company.<sup>2</sup>

“Consolidation” has not acquired a recognized judicial construction, so as necessarily to mean a dissolution of the old; the real effect is to be learned from the facts and circumstances, terms of the contracts and legislation, and the intent of the parties; from which it may appear that one or the other of the original companies, or all, were to remain in existence, or one might continue in existence, but under a new name, with enlarged powers.

Articles provided substantially for a consolidation and forming of one company, vesting the property of each into the consolidated company, making stockholders in each to become stockholders of the consolidated company; appointing the

<sup>1</sup> Session Laws 1869, p. 399.

opinions expressed on the former

<sup>2</sup> The report of this case covers hearing, 53 Ala. 237 to 360, viz., 123 some 70 pages, entirely too lengthy pages.

to be briefed here; it adheres to the

president and directors of the Alabama & Tennessee River R. R. Co. to full power and control over the consolidation, and making all their contracts binding, authorizing them to complete the road and to mortgage it for that purpose; making all the debts of each company obligatory upon the consolidation; provided for stockholders' meeting of said Alabama & Tennessee River R. R. Co., and gave all the new stockholders the right to vote thereat; each party should appeal to its respective legislature for a law giving one name to the consolidation, and until a common name be given, the above name shall be the active and controlling corporation. Under such articles it is held that the consolidated company was not a new corporation formed by the dissolution and merger of the three original corporations, but was the Alabama & Tennessee River Railroad Company continued in existence under a new name and with enlarged powers.<sup>1</sup>

<sup>1</sup> Appellant's authorities: The former opinion, 53 Ala. 287-360; also Railroad Company v. Harris, 12 Wall. 651. Central R. R. & Banking Co. v. Georgia, 8 Otto 359, which pronounces as *dicta* the cases of Clearwater v. Meredith, 1 Wall. 40, and McMahon v. Morrison, 16 Ind. 172.

If property is transferred and the transferee promises to pay the debts of the transferor, it creates a trust on the property so long as it is not sold to *bona fide* purchasers without notice. 2 Story's Eq., §§ 1257-59; 2 Spence's Eq. 287; Perry on Trusts, §§ 241, 594; Hallett v. Hallett, 2 Paige 15; Harris v. Fly, 7 Paige 421; Spofford v. Manning, 6 Paige 383; Dodge v. Manning, 11 Paige 334; Gregory v. Williams, 3 Mer. 382; Sheppard v. Sheppard, 7 John. Ch. 57; Clopton v. Sledge, 6 Ala. 589; Hobson v. Andrews, 23 Ala. 219. Mortgagees had notice of the old company's debts; they are recited in the mortgage. Branch v. M. & W. P. R. R. Co., 59 Ala. 139. The creditors get a lien as soon as the corporation is dissolved, and it is superior to all other liens

afterward acquired, except by purchasers without notice. Mumma v. Potomac Co., 8 Peters 281; Dummer v. Wood, 3 Mason 308; Perry on Trusts, §§ 241-2; 2 Story's Eq., § 1252; Angell & Ames on Corpor'ns., §§ 599, 600, notes; Huckabee v. Smith, 53 Ala. 191; Bank of St. Mary's v. St. John, 25 Ala. 566.

Appellee's authorities: That the American doctrine is that a consolidation is a dissolution of the original corporations, and at the same instant the creation of a new one. Brice's Ultra Vires by Green, 538-9, note, and 550; McMahon v. Morrison, 16 Ind. 172; Lauman v. R. R. Co., 30 Penn. St. 42; Powell v. R. R. Co., 42 Mo. 63; Clearwater v. Meredith, 1 Wall. 40; Bishop v. Brainard, 28 Conn. 289-299. The legislature using the term "consolidation" repeatedly, must have used it in the sense fixed by judicial construction. Ex parte Vincent, 26 Ala. 153; 5 Cranch 42; 2 Peters 18; 3 Gray (Mass.) 451.

By the consolidation the unpaid subscriptions became discharged as a matter of law. Nugent v. Supervis-

## SECTION EIGHT.

**Lightner v. Boston & Albany R. R. Co., 1 Lowell 388.****Same subject continued.**

Case in Federal Court (Massachusetts) for an infringement of a patent.

Plaintiff was patentee of axle boxes and granted licenses to the Boston & Worcester and Western Railroad corporations, respectively. Defendant corporation was formed by the consolidation of those two corporations under the act of Massachusetts of 1867, by which the consolidated corporation "should have, hold and enjoy all the powers, rights, privileges and franchises, property, claims, demands and estates which at the time of such union were held and enjoyed by either of the then existing corporations." Judgment for defendant.

LOWELL, J. "I can not see that the union of the two lines under one management can affect the plaintiff unfavorably." If two persons are licensed to use a patent and they afterward become partners they would still be authorized to make the use. "It is true that defendant corporation is distinct from either of the component corporations, but that is mere matter of detail and convenience. The old corporations have never been dissolved, and might well enough be held to exist for all purposes for which their continuance is necessary, as indeed the statute says they shall continue for certain purposes."<sup>1</sup>

ors, 19 Wall. 248; Black v. Canal Co., Wall. 654; Bush v. Johnson, 21 Ind. 9 C. E. Green 455; Brice's Ultra Vires, 299; 6 Vroom (N. J.) 325; 4 Biss. 78; 539-40. 9 C. E. Green 453; 33 N. Y. 421.

The consolidation created a new, distinct and independent corporation, deriving its powers from both states, and invested with all the various rights, franchises and property of its components. Cases, *supra*, and M. & L. R. R. Co. v. Lomax, 7 Ind. 406; Paine v. Lake Erie, 31 Ind. 288; 28 Conn. 289, and 26 Conn. 549; Shaw v. N. C. R. R. Co., 16 Gray 407; Hamilton Mutual Ins. Co. v. Hobart, 2 Gray 543; P. & W. R. R. Co. v. Maryland, 10 How. 876-388; 18 Wall. 200; 14 Citations in the opinion in addition to the foregoing, as to meaning of "amalgamation." Empire Assn. Co. Ex parte Bagshaw (L. R. 4 Eq. 341, 347); *Ultra Vires*, 510; In re Bank of Hindustan, Higg's Case, 2 H. & M. 666; Green's Brice's Ultra Vires, 509-510, note; Eaton & Hamilton R. R. Co. v. Hunt, 20 Ind. 457.

<sup>1</sup>Note to this case, No. 8843 Federal Cases, cites Montross v. Mabie, 80 Fed. Rep. 236; Lane v. Locke, 150 U. S. 193; 14 S. C. R. 79.



## CHAPTER VIII.

## THE SUCCESSIVE CORPORATIONS ARE NOT IDENTICAL.

The act of consolidation effects a dissolution of the old corporations and the creation of a new one with property, liabilities and stockholders derived from those passing out of existence.

The constituent corporations remain as before; each has its own entity as a citizen of the state which created it, but the consolidation also has its own identity and may transact its business in, and is deemed a citizen of, any of the states of which the constituents are citizens; formed of three, it is in effect a corporate trinity, having a citizenship identical with each constituent.

Status of the consolidation may be determinable from the text of the statute; being referred to as a new corporation, it must be deemed to be one.

Purchasing all the property of the old corporation, does not invest the new one with "the right to be a corporation;" such right is derived only from the state and the recipient becomes thereby a new corporation.

Identity of purpose by two corporations organized by the same persons in different states, though under the same name, does not make identity of corporate entity.

New powers, new franchises, new stockholders and an additional line of railroad are factors determining that the consolidation may be a different entity from the constituent.

The status of the constituents may be preserved for some purposes and the new corporation may also acquire an entity of its own.

The existence of the new corporation commences with the date of the consolidation.

## SECTION ONE.

**Clearwater v. Meredith, 1 Wallace, 25.**

**The consolidation creates a new corporation and dissolves the old ones.**

Meredith guaranteed to Clearwater that the latter's stock in the Short Line Railway would maintain a certain value.

Thereafter said road was consolidated with two others; it is held that this creates a new corporation, dissolves the old ones, materially changes Meredith's undertaking and releases him. Following is opinion in full:

In order to arrive at a correct solution of this question, it is important to consider whether the *plea* is a good one; for a demurrer, whenever interposed, reaches back through the whole record, and "seizes hold of the first defective pleading." The plea in controversy confesses the original cause of action, but sets up matter which has arisen subsequent to it, to avoid the obligation to perform it. It acknowledges that the guaranty was given as claimed, but insists that the consolidation of the interests and stock of the three railroad companies necessarily destroyed and rendered worthless and of no value the guaranteed stock, and that Clearwater, having consented to the transfer, is in no position to claim redress from Meredith and his co-defendants.

If Clearwater was a consenting party to a proceeding which, of itself, put it out of the power of the defendants to perform their contract, he can not recover, for promisors will be discharged from all liability when the non-performance of their obligation is caused by the act or the fault of the other contracting party. 2 Parsons on Contracts, 188.

The Cincinnati, Cambridge and Chicago Short Line Railroad Company, whose stock was guaranteed, was, as stated in the pleadings, organized under a general act of the State of Indiana, providing for the incorporation of railroad companies. This act was passed May 11, 1852, and contained no provision permitting railroad corporations to consolidate their stock. It can readily be seen that the interests of the public, as well as the perfection of the railway system, called for the exercise of a power by which different lines of road could be united. Accordingly, on the 23d February, 1853, the General Assembly of Indiana passed an act allowing any railroad company that had been organized, to intersect and unite their road with any other road constructed or in progress of construction, and to merge and consolidate their stock, and on the 4th of March, 1853, the privileges of the act were extended to railroad companies that should afterward be organized.

The power of the legislature to confer such authority can

not be questioned, and without the authority, railroad corporations organized separately, could not merge and consolidate their interests. But in conferring the authority, the legislature never intended to compel a dissenting stockholder to transfer his interest because a majority of the stockholders consented to the consolidation. Even if the legislature had manifested an obvious purpose to do so, the act would have been illegal, for it would have impaired the obligation of a contract. There was no reservation of power in the act under which the Cincinnati, Cambridge & Chicago Short Line Railway was organized, which gave authority to make material changes in the purposes for which the corporation was created, and without such a reservation, in no event could a dissenting stockholder be bound.

When any person takes stock in a railroad corporation he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed should be changed in its purposes and character, at the will and pleasure of the majority of the stockholders, so that new responsibilities, and it may be new hazards, are added to the original undertaking. He may be willing to embark in one enterprise and unwilling to engage in another; to assist in building a short line railway, and averse to risking his money in one having a longer line of transit.

But it is not every unimportant change which would work a dissolution of the contract. It must be such a change that a new and different business is superadded to the original undertaking. *The Hartford, etc., R. R. Co. v. Crosswell*, 5 Hill 383; *Banet v. The Alton, etc., R. R.*, 13 Ill. 510. The act of the legislature of Indiana, allowing railroad corporations to merge and consolidate their stock, was an enabling act—was permissive, not mandatory. It simply gave the consent of the legislature to whatever could lawfully be done, and which without that consent could not be done at all. By virtue of this act, the consolidations in the plea stated were made. Clearwater, *before* the consolidation, was a stockholder in one corporation, created for a given purpose; after it he was a

stockholder in another and different corporation, with other privileges, powers, franchises and stockholders. The effect of the consolidation "was a dissolution of the three corporations, and at the same instant, the creation of a new corporation, with property, liabilities, and stockholders, derived from those passing out of existence." *McMahan v. Morrison*, 16 Ind. 172. And the act of consolidation was not void because the state assented to it, but a non-consenting stockholder was discharged. *McCray v. Junction Railroad Co.*, 9 Ind. 358. Clearwater could have prevented this consolidation had he chosen to do so; instead of that he gave his assent to it and merged his own stock in the new adventure. If a majority of the stockholders of the corporation of which he was a member had undertaken to transfer his interests against his wish, they would have been enjoined. *Lauman v. Lebanon Valley Railroad*, 30 Pa. St. 46. There was no power to force him to join the new corporation, and to receive stock in it on the surrender of his stock in the old company. By his own act he has destroyed the stock to which the guaranty attached, and made it impossible for the defendants to perform their agreement. After the act of consolidation the stock could not have any separate, distinct market value. There was, in fact, no longer any stock of the Cincinnati, Cambridge and Chicago Short Line Railway.

Meredith and his co-defendants undertook that the stock should be at par in Cincinnati, if it maintained the same separate and independent existence that it had when they gave their guarantee. Their undertaking did not extend to another stock, created afterward, with which they had no concern, and which might be better or worse than the one guaranteed. It is not material whether the new stock was worth more or less than the old. It is sufficient that it is another stock, and represented other interests.

But it is said that the plea is defective because it does not aver that the consolidation was an act done without the consent of the defendants. The pleadings do not aver that the defendants were stockholders in any of the roads whose interests were merged, and if they were not, it is not easy to see what right they had to interpose objections to consolidation, nor how their consent was necessary to carry out the

object contemplated. If the plaintiff consented because they did, and it is meant to be argued on that account, they would still be liable on their contract; the answer is, that this is not a matter to be negatived by the defendants, but the plaintiff should reply the fact. 1 Chitty's Pleading, 222.

It follows that the fifth plea presented a complete defense in bar of the action.

In this plea there were two points, and two only, which the plaintiff had the right to traverse. He could deny either the act of consolidation, or that he gave his consent to it. He could not deny both, for that would make his replication double, and if either fact was untrue the defense was destroyed. The truth of both was essential to perfect the defense. But traverse can only be taken on matter of fact, and is always inadmissible to tender an issue on mere matter of law. 1 Chitty's Pleading, 645.

The last replication does traverse a conclusion of law. Whether the stock of the Cincinnati, Cambridge and Chicago Short Line Railway Company was destroyed and rendered worthless and of no value was not a question for a jury to try. If the roads were consolidated with the consent of the plaintiff, then it followed, as a conclusion of law, that the stock was destroyed and of no value. The stock passed out of existence the very instant the new corporation was created. The issue, therefore, tendered by the plaintiff in his last replication, was an immaterial one, and the court did not err in sustaining a demurrer to it.

But the plaintiff claims the right to have the decision of the court below on the sufficiency of his previous replications reviewed here. This he can not do. Each replication in this cause is complete in itself; does not refer to, and is not a part of what precedes it, and is new pleading. When the plaintiff replied *de novo*, after a demurrer was sustained to his original replication, he waived any right he might have had, to question the correctness of the decision of the court on the demurrer. In like manner he abandoned his second replication, when he availed himself of the leave of the court, and filed a third and last one.

But the plaintiff insists that even if his replication was bad, that still upon the whole record he was entitled to judgment,

because the first and the fourth pleas were undisposed of. If an issue in fact had been joined on the fifth plea, and found for the defendants, judgment was inevitable for them, because the plea was *in bar* of the action, and the other pleas would then have presented immaterial issues. If the plea was true, being a complete defense, it would have been useless to have tried other issues, for no matter how they might terminate, judgment must still be for the defendants. The state of pleading leaves the fifth plea precisely as if traverse had been taken on a matter of fact in it, and determined against the plaintiff. "On demurrer to any of the pleadings which go to the action, the judgment for either party is the same as it would have been on an issue in fact, joined upon the same pleading and found in favor of the same party." (Gould's Pleadings, ch. IX, § 42.) "And when the defendants' plea goes to bar the action, if the plaintiff demur to it and the demurrer is determined in favor of the plea, judgment of *nil capit* should be entered, notwithstanding there may be also one or more issues in fact; because, upon the whole, it appears that the plaintiff had no cause of action." (Tidd's Practice, 4th Am. Ed. 741-2.) There is no error in the record.

Judgment affirmed with costs.

## SECTION TWO.

**Fitzgerald v. Missouri Pacific Ry. Co., 45 Federal, 812.**

**The new corporation has its own identity.**

The new corporation has an entity and existence of its own, independent and aside from the constituent corporations. Where three corporations, each of a different state, are consolidated and form a new one, the three still remain, and the separate identity of each, as a citizen of the state which created it, remains. The new corporation has also its own identity as one corporation, as a unit, not as three corporations, and in the absence of a statutory provision to the contrary, it may transact its business in one state for all, and the contracts it enters into and the liabilities it incurs in one state are binding upon it in all the states, and may be enforced against it in any one of them when the action is transitory.

When a consolidated company is formed by the union of several corporations chartered by different states, it is a citizen of each of the states which granted the charter to any one of its constituent companies, and when sued in one of these states it can not claim the right of removal on the ground that it is also a citizen of another state.

A consolidated corporation which bears the same name in three states, and has one board of directors and the same shareholders, and operates the road as one entire line, and is designed to accomplish the same purposes, and exercises the same general powers and functions in all the states, is not the same corporation in each state. While it is a unit and acts as a whole in the transaction of its corporate business, it is not a corporation at large, nor is it a joint corporation of the three states. Like all corporations it must have a legal dwelling place, and it dwells in three states, and is a separate and legal entity in each. It is in effect a corporate trinity, having no citizenship of its own distinct from its constituent members, but a citizenship identical with each.

### SECTION THREE.

**People v. New York, C. & St. L. R. Co., 15 New York Supp. 635.**

**It is a new creation.**

Suit by the state for the recovery of one-eighth of one per cent organization tax on the capital of the New York, Chicago & St. Louis R. R. Co.

A corporation, organized on a basis of \$4,500,000, pays the tax; it thereafter joins with another, making a capital of \$7,500,000 and does not pay the tax, and thereafter joins with two others, making in all \$30,000,000; the same name is continued throughout; it is held that this last result is a new corporation, and must pay the incorporation tax of one-eighth of one per cent on the last named capital.

The reasoning by two of the judges to the effect that it is a new corporation, is based on the language of the consolidation statutes,<sup>1</sup> which in several clauses speaks of the result as being a new corporation. The third agrees with the other

<sup>1</sup> 1869, Ch. 917; 1881, Ch. 685.



two that it would be a new corporation if all the constituent corporations were domestic, but as some of them are not, the state never had jurisdiction over them; the majority, however, insists that it is a new corporation and subject to the tax, and say that if corporations from other states voluntarily take the benefits of the laws of New York they must bear the burdens.

#### SECTION FOUR.

**People ex rel. Schurz v. Cook, Secretary of State**, 110 N. Y. 448; 111 N. Y. 688; 18 N. E. 118; 19 N. E. 286. Affirming 47 Hun 467, 637.

#### Same subject continued.

Railroad companies mortgaged their properties and franchises; the same were thereafter foreclosed, and the purchasers incorporated themselves into a corporation to receive the property at the sale and to continue the business. The state claimed that such corporation was an entirely distinct one from the former one, and was therefore subject to the incorporation tax, namely, one-eighth of one per cent upon the authorized capital, and this view was sustained by the court.

The statute applies to every act of incorporation and can not be restricted to those cases in which the state grants some franchise to a corporation other than the franchise to be a corporation. The corporation in question is a new one and entirely different from the one which was the mortgagor; true it has all the powers, privileges and immunities of the other, but that does not make it the same by any means. "The right to be a corporation, which the old corporation had, was not mortgaged and was not sold, and did not pass to the purchasers, and they only obtain such a right upon filing the certificate mentioned; and then they obtain by direct grant from the state and not in any degree by the sale and purchase of the franchises, etc., of the old corporation."

#### SECTION FIVE.

**People ex rel., etc., v. Rice**, 11 N. Y. Supp. 249, affirmed; 28 N. E. 251.

#### The statute calls it a new corporation.

Two corporations, the New York Phonograph Company and the Metropolitan Phonograph Company were organized under

the Manufacturing Act of 1848, the former for fifty years from October 4, 1888, the other for fifty years from February 5, 1889; each upon its organization paid the tax of one-eighth of one per cent upon its capital.<sup>1</sup> These companies entered into an agreement of consolidation pursuant to chapter 960, Laws 1867. The name of the company thus to be formed is the New York Phonograph Company; its duration fifty years from October 4, 1888, and its capital the same as the aggregate of the two consolidating companies. The secretary of state refused to file their papers because the tax had not been paid. Mandamus upon him denied. There could be no consolidation without permission by law of the state. Such permission is given, and the law which gives it speaks of "the new company" and specifies its powers. It is argued that the constituent corporations were entitled to their franchises for which they had paid the tax; that the new body is only a union of the two with no new corporate rights, and therefore liable to no new tax. This is true, but it is also true that these corporations will cease to exist when the new one is formed. "It was for this very purpose that they executed the agreement; the purpose to end their own existence and to form a new person." The new company is not a partnership of the two old companies. It is entirely a new corporation.<sup>2</sup> This is also seen from the consolidation act itself, which says that on the organization of such new company the rights, etc., of the said several corporations shall be transferred to, and vested in such new corporation. If there were not a new corporation this declaration would be unnecessary. It is urged that by paying the taxes the original corporations purchased the right to be corporations, and therefore should not be compelled to purchase it again. But corporate rights are not special concessions; they are open to all; the tax is not a purchase price. The words of the statute imposing the tax are clear and unambiguous, and easily understood when applied to corporations which were organ-

<sup>1</sup> As required by Sec. 1, Chap. 148, treasurer, for the use of the state, a Laws of 1886, "every corporation tax of one-eighth of one per centum."

\* \* \* incorporated by or under <sup>2</sup> Shields v. Ohio, 95 U. S. 819; any general or special law of this Railroad Co. v. Georgia, 98 U. S. 359; state. having capital stock divided Railroad Co. v. Maine, 96 U. S. 499. into shares, shall pay to the state

ized before its enactment in 1866, if two such corporations should consolidate.

The new corporation being thus incorporated "by or under any general or special law" would have to pay the tax, and there is no condition nor proviso whatsoever placing the more recent corporations on a different footing. The legislature has made no distinction in this respect and the court has no power so to do. The relator presents a strong equity but the tax is not unreasonable; the court can not yield to an equity in violation of the language of the statute.<sup>1</sup>

### SECTION SIX.

**Nashua & L. R. Cor. v. Boston & L. R. Cor., 10 S. C. R. 1004.**

**Identity of purposes, etc., does not make identity of existence.**

The Nashua & Lowell railroad corporation was incorporated in New Hampshire, by act of legislature, in 1835, and in 1836 the same persons composing it were incorporated in Massachusetts by act of legislature under the same name to build the portion of the road lying in the latter state. It is held that they are two separate and distinct entities, and that the one incorporated in New Hampshire is a citizen of that state, and as such, can be a plaintiff to a suit in the Federal Court of Massachusetts. This is held, although by each of said legislative acts provision is made for the union of the two corporations, and for enabling them to conduct their business as one corporation; this did not change the existence of the complainant as a citizen of New Hampshire; no other state could by its legislation change this character of that corporation, however great the rights and privileges bestowed upon it. The new corporation created by Massachusetts, though bearing the same name, composed of the same stockholders, and designed to accomplish the same purposes, is not the same corporation with the one in New Hampshire. Identity of the name, power and purposes

<sup>1</sup> By the statute of 1892 (chapter 668) the consolidation of *two* corporations need pay a tax on only the excess of capital over the aggregate of the constituent capitals. This has been construed as applicable to *more* than two corporations consolidating. *People ex rel. Eickemeyer Field Co. v. Rice*, 21 N. Y. Supp. 48.

does not create an identity of origin or existence, any more than any other statute alike in language, passed by different legislative bodies, can properly be said to owe their existence to both. To each statute and to the corporation created by it there can be but one legislative paternity.

### SECTION SEVEN.

**Pullman Palace Car Co. v. Missouri Pacific Ry. Co., 115 U. S. 587; 6 S. C. R. 194.**

**The consolidation is a different entity from the constituent.**

The Pullman Palace Car Company had a contract with the Missouri Pacific Railway Company, whereby the latter was to use the former's cars on its road "and on all roads which it now controls, or may hereafter control, by ownership, lease, or otherwise." Thereafter the railroad company "consolidated with itself certain other companies under the laws of Missouri, retaining its former name, and said consolidated company assumed all the obligations of the separate consolidating companies;" and for these reasons the Pullman company insisted that the consolidated company must run the Pullman cars on all the roads brought in by the consolidation. It is held, however, that the consolidated company is a new company, and that the old ones are dissolved.

The present Missouri Pacific Company is a different corporation from that which contracted with the Pullman company. The original company owned and operated a railroad from St. Louis and Kansas City; the new company owns that road and others besides. "It is a new corporation created by the dissolution of several old ones and the establishment of this in their place. It has new powers, new franchises, and new stockholders."<sup>1</sup>

And the obligations of the old are assumed by the new one, but only to the extent as they existed against the old one, and that was to run the palace cars only on the road owned by the Missouri Pacific at the time of the consolidation. The

<sup>1</sup> Citing *Clearwater v. Meredith*, 1 508; *Railroad Co. v. Georgia*, 98 U. S. Wall. 42; *Shields v. Ohio*, 95 U. S. 864; *Louisville & N. R. Co. v. Palmes*, 823; *Railroad Co. v. Maine*, 96 U. S. 109 U. S. 244; 3 S. C. R. 198.

Missouri Pacific also acquired all but about 1,795 of the 220,682 shares of the St. Louis, Iron Mountain & Southern. The two roads came under the same general management, had their general offices together and five directors in common, with the intent and for the purpose, as the bill charged, of transferring the ownership and control of the latter to the former road. This, it was asserted by the Pullman company, brought the latter road under the terms of the contract, and required the Missouri Pacific to run the Pullman cars thereupon; but it is held that the latter road is not under the control of the former.

### SECTION EIGHT.

**Ohio & M. Ry. Co. v. People, 14 N. E. 874; 123 Ill. 467.**

**The new corporation may be foreign though the old one was domestic.**

The Ohio & Mississippi Railway Company was a corporation organized under the laws of Illinois; another company by the same name existed in Indiana organized under the laws of that state, and another similarly in Ohio. These three companies were allowed to consolidate, statutes to that effect being enacted in each of these states, in 1867. The constitution of Illinois of 1870, provides that "a majority of the directors of any railroad corporation, now incorporated or hereafter to be incorporated by the laws of this state, shall be citizens and residents of this state."

Defendant, the Ohio & Mississippi Railroad Company (namely the consolidated one) was prosecuted in Illinois by *quo warranto* for violation of this provision, it not having a majority of its directors resident in Illinois. Conviction and fine of \$1,000 below, were reversed above. Scott, J., not concurring. Magruder, J., dissenting, says, the defendant was a corporation prior to 1870, therefore "*now* incorporated," when the constitution was adopted; that there was nothing in its charter preventing the state from imposing upon it the terms contained in the constitution, hence it should obey the same.

The majority, however, are of the opinion that a *new* corporation was formed by the act of consolidation, and that it can not be deemed to be a corporation under the laws of Illinois.

The argument of the court is, in brief, that the new corporation derives new powers and attributes from and under the statutes of the three different states under which the consolidation is had, and hence it can not be said to be incorporated under the laws of Illinois.<sup>1</sup> Such a corporation may be sued in either state.<sup>2</sup> The constituent companies do not necessarily cease to exist; they lie dormant, and their powers, etc., are exercised by the new consolidated corporation.<sup>3</sup> The consolidated company necessarily has its constituents in several states, and answers the commendable purpose of forming a through railroad line; it would have to be dissolved unless the other states acquiesce in the assumption by this state of jurisdiction over the *personnel* of the directors. Such could not have been the intent of the framers of the constitution.

#### SECTION NINE.

**Gray v. National Steamship Co., 115 U. S. 116.**

**New corporation is not bound by judgment against the old for loss occurring after the transfer.**

The National Steam Navigation Company went into liquidation on August 15, 1867, and sold all its vessels and other property to the National Steamship Company. It retained no power to do business, and existed only for the purpose of liquidation; the purchase price was paid by the new company by issuing its own stock to the stockholders of the old company in place of their old stock, and by paying the dissenting ones in cash. The sale was subject to the debts of the old company; the officers thereof became the officers of the new company. October 24, 1867, one of the vessels of the National Steamship Company collided with another vessel and caused the death of

<sup>1</sup> Citing in support of these conclusions, *State v. Railroad Co.*, 66 Me. 488; affirmed, 96 U. S. 499; *Minot v. Railroad Co.*, 18 Wall. 206; *Graham v. R. R. Co.*, 118 U. S. 161; 6 S. C. R. 1009; *Bridge Co. v. Mayes*, 81 Ohio St. 317; *Sprague v. R. R. Co.*, 5 R. L. 233; *Pierce on Railways*, 20.

<sup>2</sup> *Culbertson v. Navigation Co.*, 4 McLean, 544; *Railroad Co. v. Railroad Co.*, 6 Biss. 219.

<sup>3</sup> *Farnum v. Canal Co.*, 1 Sum. 62; *Tagart v. Railway Co.*, 29 Md. 557; *Banking Co. v. Georgia*, 92 U. S. 667.

a man, whose administrator thereupon brought suit and recovered judgment against the National Steam Navigation Company. The judgment not being paid, the plaintiff brought a bill against the National Steamship Company, alleging that the company simply assumed and became known by the name of the National Steamship Company, did so to cure a technical defect, and fraudulently to make it appear that the National Steam Navigation Company's property was no longer subject to its debts. The various incorporating acts and proceedings, being under the English company's acts, are alluded to in the supreme court opinion, and recited at great length in the court below,<sup>1</sup> and the conclusion is reached that the later company is entirely separate and distinct from the former; it is not a mere change of name, nor the amendment of the former company's existence, but the creation of an entirely new company. The plaintiff should have brought the suit and obtained judgment originally against the National Steamship Company, and given it its day in court. This conclusion the court says is too plain for further comment.

#### SECTION TEN.

**Prouty v. Lake Shore & M. S. R. Co., 52 N. Y. 303.**

##### **Consolidation not bound by judgment against constituent.**

Action commenced May 23, 1869, against the Michigan Southern & Northern Indiana Railroad Company for breach of a guaranty of dividends on construction stock issued in 1857; accounting asked, also injunction restraining defendant from paying other dividends until those demanded had been paid. The law allowing consolidation of railroads was passed May 20, 1869.<sup>2</sup> The original defendant consolidated May, 1869, with the Lake Shore Railway Company, under the name of "The Lake Shore & Michigan Southern Railway Company," which in August, 1869, consolidated under the same name with another company, pursuant to the laws of six states, and thus formed a continuous line from Buffalo to Chicago. The action was referred May 12, 1870. It does not appear that

<sup>1</sup> 7 Fed. Rep. 278.

<sup>2</sup> Laws 1869, c. 917, p. 2399.



the consolidated company at any time had notice thereof or participated therein. The referee reported April, 1872, making no reference to appellant. The decree finds for defendants (?) for the amount claimed, and restrains said original defendant from in any manner laying out, expending or disposing of, or in any manner charging the property and assets of the company or its rights and franchises until the payment of said amount.

After the coming in of the report, the consolidated company (appellant) was on motion substituted as defendant in place of the original defendant; from which order it appeals. This order is held erroneous.

In so far as the property of the original defendant is concerned, the consolidated company is its successor; but not so in respect to the other companies which compose the consolidation. The creditors of each of the old companies have no claim upon the consolidated company excepting as it assumed the obligation of each. And so far as concerns any trust in the property, the consolidation is liable as manager of the property only to the beneficiaries of each of the old companies to the extent that it receives the property of each, and is bound by all proceedings as to each estate had against or done by their predecessor in each. Hence, were the substitution of the consolidated company made only with reference to the property derived from the original defendant, the case would be simply one of the substitution of new parties representing the same interests as the original defendant, and might be properly done by motion within one year.<sup>1</sup> But the order goes further and binds all the property of the consolidated company to the payment of the judgment, and by the restraint of the injunction prevents the payment of any dividend until the plaintiff has been paid, thus binding the new defendant not only as representing the original defendant, but also the other companies, which, with it, formed the consolidation; as against which other companies the plaintiff never had any demand at law nor any charge upon their estates in equity; and said judgment and order are thus imposed upon the new defendant under a decision rendered subsequently to the consolidation, in an action to which neither it nor said other companies were made parties.

<sup>1</sup> Code, § 121.

It may be that the obligations which the consolidated company has assumed, render it just, that such a judgment should ultimately be rendered against it; but however clearly this may appear, it can legally be effected only in a direct suit against it, based on its assumption of such liability, and can not be accomplished by the summary process of substitution of name on motion, and thus making it subject to an adjudication previously made against the original debtor.

### SECTION ELEVEN.

**Kansas O. & T. Ry. Co. v. Smith, 19 Pacific, 636; 40 Kansas 192.**

#### **Appeal abates by reason of consolidation.**

Judgment for \$335 was given against the defendant railroad company in a condemnation proceeding in March, 1886. On May 6, 1886, the land owner, Smith, filed an appeal bond; on May 31, 1886, the defendant company consolidated with a number of others and formed a new corporation. In October, 1886, Smith obtained a judgment for \$950 in the district court, whereupon the defendant appealed; Smith moved in the supreme court that the appeal be dismissed on the ground that the defendant had ceased to exist by reason of said consolidation. Motion sustained; the court says, the original defendant "has ceased to exist,<sup>1</sup> has become defunct, is dead, and therefore not able either to prosecute or defend."<sup>2</sup>

### SECTION TWELVE.

**Snook v. Georgia Improvement Co., 9 S. E. 1104.**

#### **Intent of statute was to create a new corporation.**

The Atlanta & Hawkinsville Railroad Company had been organized under a general law; thereafter the legislature, in

<sup>1</sup> Citing *State v. Connors*, 10 Kans. 569-578; *Pa. Coll. Cases*, 13 Wall. 190. transpired in the case after *May 31*, 1886, is void.

<sup>2</sup> It would appear as though Smith had been hoisted by his own petard; the fine point which he raised in the supreme court, would seem also to defeat his judgment in the district court (obtained in *October*, 1886); the supreme court says, everything that The proper process is to substitute the consolidation, and this must be done within a year. *Civ. Code*, §§ 40, 425-435; *Cunkle v. I. R. Co.*, 40 *Pacific R.* 184. See also *C. K. & W. v. Butts*, 41 *Pacific R.* 950.

1886, passed an act entitled, An act to incorporate the Atlanta & Hawkinsville Railroad Company; the act conferred the usual corporate powers; the names of the corporation were not the same altogether as in the original organization. Then in 1887, an amendment was passed to Act of 1886, changing the name to that of Atlanta & Florida Railroad Company, and referring to it as the company chartered by the act of 1886. Construing the Acts of 1886 and 1887 together, and considering that a new charter to the original company was not needed as it was sufficiently well organized under the general law, the court reaches the opinion that the acts of 1886 and 1887, really created a new company, distinct and different from the one organized under the general law and not entitled to demand or sue for stock subscriptions made to that company.

**Prior case distinguished as dictum.**

The last decision states that the case of Johnston v. Crawley, 25 Ga. 316, which seems to hold that the corporations would be the same under such circumstances, is merely a *dictum* on this point; the decision was upon the priority of one mortgage over another, irrespective of the fact whether certain corporations were the same or not.

### SECTION THIRTEEN.

**Mason v. Finch et al., 28 Mich. 282.**

**Corporation is not the same in identity with a precedent association.**

A party having an execution against a masonic lodge (incorporated) called "Adrian Chapter Number Ten," levied upon certain chattels, which were then replevied by a masonic lodge (unincorporated) known as "Adrian Chapter Number Ten of Royal Arch Masons." The creditor contended that the unincorporated lodge had become merged in the incorporated body, and hence, that the property really belonged to the latter, and was therefore subject to the execution. It is decided, however, that there was no such merger. The two bodies, viz., the corporation and the society, remained separate and distinct.

It was insisted that the corporation was really the incorpora-

tion of the society itself; that the statute contemplated the incorporation of only existing lodges, and that the incorporators assumed to act for the society, and the latter acquiesced therein.

The court holds that even an absolute identity of membership would not, by itself, lead to a cessation of the society's existence. The same persons may, and often do, belong to several different bodies, incorporated or otherwise. There can be no incorporation without steps taken to that effect; the party must assent to be brought in; he need not dissent in order to be kept out. Some affirmative action on the part of the society must be shown to prove that it went into the corporation. The society is found in full activity and existence as such after the corporation was organized; it must have been swallowed up by the latter, if at all, at the time of the latter's organization (but evidently was not). The corporation could not thereafter identify itself with the society; it could, of course, continue to take new members, but only as individuals. It is doubtful whether a society, as such, can in any manner be bodily transferred into a corporation. Nothing but unanimous consent could bind the members of the society to any matter not within its proposed scheme. No such consent is here asserted. Nor was there ever any action by the society, as such, in regard to the matter. Acquiescence of the society can not be relied on, unless an estoppel has arisen. The individuals who assumed to act, having no authority to do so, have equally no authority to ratify. The society's continuing existence and activity is a denial of its non-existence; there can be no merger unless there was a complete cessation of the society's action.

All that is shown is, that the incorporation has assumed the name of the society without its action or permission; the latter has not been incorporated, nor has it lost its identity. The signers of the article created a new and separate organization, while the old one remained unchanged. It is unnecessary to decide whether the statute contemplated the incorporation of only existing lodges; that inquiry would concern only the validity of the incorporation; the society has never been brought into it; has never consented by any authoritative act

to be brought in, and certainly can not be forced in by statute or otherwise without its consent.<sup>1</sup>

SECTION FOURTEEN.

**Paine et al. v. The Lake Erie & Louisville R. R. Co., 81 Indiana 283.**

**Immaterial whether identical or not.**

Action by a railroad company to have satisfaction entered of a mortgage. Complainant is a consolidated corporation, composed of the original mortgagor, an Indiana corporation, and another, an Ohio corporation.

A grave question is presented in the argument as to the power of two states to create one corporation; it is claimed that to maintain this action the consolidation must have resulted in the formation of one company, and that this is simply impossible. It is urged that it might as well be claimed that a child can have two mothers, as that two states can create one corporation; this is unimportant. Appellant concedes that the effect of the consolidation might be to create two corporations, with the same name and stockholders, a unity of stock and interest. This suit can well be maintained under either view; if there is but one corporation then the suit is undoubtedly well brought; if there are two, then all parties necessary for a complete settlement are before the court; the complaint shows that both corporations are before the court.

Facts showing the origin, consideration and payment of the mortgage are reviewed.

It is clear that the new company succeeded to the rights of the old corporations. "The new was composed of the elements of the old; it was the same under a new form. It is only a play upon words to say that, Phoenix-like, the new arose from the ashes of the old. There was no turning to ashes necessary in the process. It only required a commingling of the elements of which the old was composed. The new assumed the liabilities and succeeded to the rights of the old."

SECTION FIFTEEN.

**Pennsylvania College Cases, 18 Wall. 190.**

**Constituent colleges still exist.**

Jefferson college, chartered under the laws of Pennsylvania,

<sup>1</sup>The Farmers Alliance Association of the statutory provisions in that time they signified their acceptance S. E. R. 419.

was subject to having its charter altered by the legislature. Thereafter in 1865, by consent of its own trustees and the trustees of Washington College, the two were consolidated, their funds united into one, and the new college made liable for all the liabilities and scholarships of each of the old; but certain parts of the course were still pursued at Jefferson and the rest at Washington. Then in 1869, by another act of legislature, the several departments were "closely united" and the trustees authorized to locate them all at one or the other of the colleges, and to give an academy or some other institution to the town from which the college was removed. Accordingly the entire college was established at Washington. The removal was sought to be prevented by the trustees of Jefferson College, to which the respondents plead that the complainants as trustees had accepted the acts of the legislature, and hence their corporation became dissolved, by the creation of the new corporation. The court finds that the legislature had the right to change the charter, for the right so to do was reserved, and finds also, that such right, even if not reserved, can be exercised with consent of the corporations affected thereby and that such consent existed; finds also that by the creation of the new, the old colleges were still to exist as institutions of learning, and that by the act of legislation the two original corporations became merged in the one corporation created by said acts, and that neither of the original corporations is competent to sue for any cause of action subsequent in date to their acceptance of the new act of incorporation.<sup>1</sup>

The case of the dissenting trustees of the new corporation is disposed of on the same grounds, and the case of the scholarship holders of the Jefferson College who complained that by its removal they were subjected to greater inconvenience in making available their scholarships is disposed of on the same grounds, viz., that the right to change the charter was reserved to the legislature, and moreover was consented to by the corporation, in which case the scholarship holders can not complain, as they had no contract with the state, and hence they can not complain that the state had passed any law impairing a contract. Their contract was with the trustees and not with the state, and was subject to the state's reserved right to alter

<sup>1</sup> Citing *Revere v. Copper Co.*, 15 Pickering 851; *Attorney General v. Clergy Society*, 10 Richardson's Equity, 604.

the charter of the college. The existence of a contract between the college and the scholarship holder can certainly not have the effect of inhibiting the legislature from altering, modifying or amending the charter of the corporation by virtue of a right reserved to that effect, or with the assent of the corporation, if, in view of all the circumstances, the legislature should see fit to exercise that power.

#### SECTION SIXTEEN.

**Shields v. The State, 26 Ohio St. Rep. 86.**

**The new corporation exists as of the date of the consolidation.**

A corporation formed by the consolidation of several others is a new corporation<sup>1</sup> as of the date of its consolidation, and subject to the constitutional and statutory provisions as to rate of fare, although the constituent corporations holding prior charters would not have been thus subject.

The statute uses the words "new corporation." The old stock is extinguished; the statute says that the prior corporations "shall be taken and deemed to be one corporation," created by the act; it refers to the others as "former corporations." "The fact that it is formed out of old defunct corporations does not make it any the less a corporation created by the legislature. It is not the material out of which it is formed, but the plastic hand which formed it, that we are to look to for its character and status under the constitution."

#### SECTION SEVENTEEN.

**Wilmar v. The Atlanta & Richmond Air Line Railway Co., 2 Woods 409.**

**The new corporation is an entirety in the several states; appointment of receiver over road in different states.**

A corporation was composed of two former ones, the consolidation being effected under laws to that effect of South Carolina and Georgia; the statutes of North Carolina gave the

<sup>1</sup> Following and distinguishing *State v. Sherman*, 22 Ohio St. 411, a case of transfer of franchises.



corporation the same rights there as it had in other states. The consolidation made a deed of trust on its entire lines in the three states.

The federal court in Georgia appointed a receiver for the entire lines in the three states.

Opinion by Woods, Circuit Judge.

"It seems to me quite clear that the purpose of the legislation of Georgia and South Carolina in reference to that corporation, already set out in this opinion, was to create a single corporate body." They made a new corporation, with new name, and a new and single board of directors—one corporation out of two. The legislatures of two different states can unite to create one corporate body.<sup>1</sup>

The bill avers, and the proofs show, that this corporate body existing in two states and owning property in three, has its residence and principal office in Georgia.

The court in Georgia, acting on the defendant personally, may control the defendant's real and other property in other states.<sup>2</sup>

A receiver may be appointed in one state for an entire line in several.<sup>3</sup>

The court may require assignments of the foreign property to be made to the receivers.<sup>4</sup>

## SECTION EIGHTEEN.

### Sundry instances.

Some of these cases should have been under Ch. VII, but appeared after that chapter was printed.

<sup>1</sup> Railroad Co. v. Harris, 12 Wall. 82. In view of the cases presented in

<sup>2</sup> Mitchell v. Bunch, 2 Paige Ch. 606; the next chapter, the questions decided by Judge Woods are of the most serious importance. If the corporations be not one and the same, but separate entities, the foreign ones in

<sup>3</sup> Ellis v. Boston, etc., Co., 107 Mass. 1. some instances are not properly nor

<sup>4</sup> Chipman v. Sabbator, 7 Paige Ch. 47; Cagger v. Howard, 1 Barb. Ch. 369; Story on Conf. of Laws, § 463; Northern, etc., Co. v. Michigan etc., Co., 15 How. 243. at all in court, nor in such case would the foreign parts of the roads be in the jurisdiction or control of the court.

One corporation owning stock and bonds in another, and having in part the same officers, also advertising as forming a continuous line with the same and even paying for goods lost in a collision on the line of such other road (being reimbursed for the same), does not thereby become identical with the other, nor responsible for its negligence in the carriage of passengers. *Pennsylvania R. Co. v. Jones*, 15 S. C. R. 136.

Nor does identity of stockholders in two corporations, and the control over each by reason of such identity, make the two corporations the same; they are in law distinct entities. *Richmond & I. C. C. v. Richmond N. I. & B. R. Co.*, 68 Fed. R. 108.

Identity of stockholders and officers does not make the corporations legally identical. They had separate stockholders and officers also, and separate property and dealings. It merely suggested and required more careful scrutiny of their transactions with each other, in which still others became interested. *Davidson v. Mexican Nat. R. Co.*, 58 Fed. 653.

The Western Telegraph Company in 1853 made an agreement with the Baltimore & Ohio R. R. Co., by which it acquired a license "so long as it should exist as a telegraph company," to erect and maintain its line upon the railroad company's land. Soon before the time at which its charter expired, the telegraph company incorporated itself under the name of "The Western Telegraph Company of Baltimore City," under the act of 1868, C. 471. This act provides that in such case the former charter shall be deemed to be surrendered. It is held, that the last corporation is a new creation, and not the same identity with the former; that the former has ceased to "exist as a telegraph company," and hence its lines lapsed to the railroad company, although otherwise all the property and debts of the former were thrown on the latter company. With the surrender of its charter the old corporation ceased to exist. The new corporation which succeeded it had a different name, a different period of existence and different powers, and was subject to different responsibilities. Nor was this deplorable (and easily avoidable) state of affairs aided by a subsequent act of legislation attempting to revive the original corporation and extend the term of its corporate existence. This could not retroactively divest the title which had accrued to the railroad company. *Latrobe v. Western Telegraph Co. (Md.)*, 21 Atl. R. 788.

A ferry company was entitled either to a renewal of its lease or to have its successors pay it the value of the buildings and improvements. It caused a new corporation to be formed, under a different name, but by the officers of the old corporation and for the benefit of such corporation and its stockholders; to this new corporation the city granted a new ferry lease; then, being sued by the old company, it is held that it had no reason to complain; there was no breach of covenant; the city had made the new lease to the new company but such new company was really the same as the old one; "the plaintiff in effect became its own successor under a new name." *N. Y. & B. F. Co. v. Mayor* (N. Y.), 40 N. E. R. 785.

National bank is identically the same with a state bank into which it is reorganized, and such state bank may sue upon paper received from such national bank: *First Commercial Bank v. Talbert* (Mich.), 61 N. W. R. 888; and so also, if a state bank is reorganized into a national, the identity is preserved: *Bank v. Phelps*, 97 N. Y. 44; or, also, if the term of a national bank is extended, "it was not a new life that it received. It was simply the power to continue the old life beyond the period first fixed for its expiration." *Trustees, etc., v. National State Bank* (N. J.), 29 Atl. R. 320. Acts of succession do not cancel the continuing obligations of corporations. *Bank v. Gay*, 57 Conn. 224, 17 Atl. R. 555; *People v. Bachus*, 117 N. Y. 196, 22 N. E. R. 759; *Bank v. Phelps*, 97 N. Y. 44.

A city is identically the same as the village which preceded it, and privileges to a water company, derived from the village, remain against the city. *Grand Rapids v. Grand Rapids Hydraulic Co.* (Mich.), 33 N. W. R. 749, citing *Regents v. Board of Education*, 4 Mich. 213; *Trustees v. City*, 31 Pa. St. 515; *St. Louis v. City, etc.*, 46 Mo. 121.

Whether an act in question is to be construed as creating a new corporation, or continuing or reviving the old one, is a matter of construction, under which "we must look to its terms and give them a construction consistent with the legislative intent and the intent of the corporation." *Bellows v. Hallowell*, 2 Mason 44, Fed. Cas. No. 1279, cited in *Frostburg v. Cumberland* (Md.), 31 Atl. R. 698. Hence, words declaring the extension of a charter for thirty years, are construed as negating the creation of a new and distinct corporation.

## CHAPTER IX.

## CITIZENSHIP OF THE VARIOUS CORPORATIONS.

The cases grouped in this chapter elucidate, among others, the following principles:

Corporate power conferred by different states, though upon the same natural persons, for the same purposes and under the same corporate name, nevertheless leaves the result a separate corporate entity in each of such states; each entity remaining a citizen of each state respectively, may sue in the federal courts in the other state.

A consolidation formed from pre-existing corporations is a citizen of each of the states which had chartered any of the constituents.

Federal corporations, those organized under acts of Congress, have the right of removal of causes because of their "arising under the laws of the United States."

Legislative recognition may make the last result a domestic corporation though there be an intermediate foreign corporation in the chain of transfers; such recognition may be found in enabling acts, as conferring powers on a foreign corporation and referring to it as the company "hereby incorporated."

The grant of corporate powers in one state upon a corporation of another state creates an additional corporation in such granting state; but this result does not follow from a sale by the domestic corporation of its property to a foreign one, and legislative acts enabling such foreign one to make the purchase and operate the property; the difference between statutes conferring corporate powers and those enabling pre-existing corporations to exercise their powers should always be borne in mind.

In case of double incorporation the particular act will be attributed to that entity whose property is involved and which is of the state in which such property is situated.

The corporation created in each state being deemed to be a separate entity, their joint co-operation in any enterprise makes a quasi partnership.

## SECTION ONE.

**Ohio & Mississippi R. R. Co. v. Wheeler, 1 Black (63 U. S.) 286.**

**The consolidation is a citizen of each state which aids in creating it.**

Assumpsit in the federal court in Indiana against the defendant, a citizen of Indiana, to recover the amount due on his subscription to the plaintiff, viz.: "The president and directors of the Ohio & Mississippi Railroad Company, a corporation created by the laws of the States of Indiana and Ohio, and having the principal place of business in Cincinnati, in the State of Ohio, a citizen of the State of Ohio." Defendant pleaded to the jurisdiction and alleged that plaintiff was incorporated under acts of Indiana, and hence was of the same state as defendant. Plea sustained. Following is opinion in full:

"This action was brought in the Circuit Court of the United States for the District of Indiana, to recover \$2,400, with ten per cent damages, which the plaintiffs alleged to be due for fifty shares of the capital stock of the company, subscribed by the defendant.

The declaration states that the plaintiffs are a corporation, created by the laws of the States of Indiana and Ohio, having its principal place of business in Cincinnati, in the State of Ohio; that the corporation is a citizen of the State of Ohio, and Henry D. Wheeler, the defendant, is a citizen of the State of Indiana.

The defendant pleaded to the jurisdiction of the court, averring that he was a citizen of the State of Indiana, and that the plaintiffs were a body politic and corporate, created, organized and existing in the same state, under and by virtue of an act of assembly of the state.

The plaintiffs demurred to this plea; and the judges being opposed in opinion upon the question whether their court had jurisdiction, ordered their division of opinion to be certified to this court.

A brief reference to cases heretofore decided will show how the question must be answered. And, as the subject was fully considered and discussed in the cases to which we are about to refer, it is unnecessary to state here the principles and rules

of law which have heretofore governed the decisions of the court, and must decide the question now before us.

In the case of *Bank of Augusta v. Earle*, 13 Pet. 512, the court held that the artificial person or legal entity known to the common law as a corporation can have no legal existence out of the bounds of the sovereignty by which it is created; that it exists only in contemplation of law and by force of law; and where the law ceases to operate, the corporation can have no existence. It must dwell in the place of its creation.

It had been decided in the case of *The Bank v. Deviary*, 5 Cr. 61, long before the case of *The Bank of Augusta v. Earle* came before the court, that a corporation is not a citizen within the meaning of the Constitution of the United States, and can not maintain a suit in a court of the United States against the citizen of a different state from that by which it was chartered, unless the persons who compose the corporate body are all citizens of that state. But, if that be the case, they may sue by their corporate name, averring the citizenship of all of the members; and such a suit would be regarded as the joint suit of the individual persons, united together in the corporate body, and acting under the name conferred upon them, for the more convenient transaction of business, and consequently entitled to maintain a suit in the courts of the United States against a citizen of another state.

This question, as to the character of a corporation, and the jurisdiction of the courts of the United States in cases wherein they were sued, or brought suit in their corporate name, was again brought before the court in the case of *The Louisville, Cincinnati and Charleston Railroad Company v. Letson*, reported in 2 How. 497; and the court in that case, upon full consideration, decided that where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of the state in which alone the corporate body has a legal existence; and that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the state which created the corporate body; and that no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States.

The question, however, was felt by this court to be one of

great difficulty and delicacy, and it was again argued and maturely considered in the case of *Marshall v. The Baltimore and Ohio Railroad Company*, 16 How. 314, as will appear by the report and the decision in the case of *The Louisville, Cincinnati and Charleston Railroad Company v. Letson*, reaffirmed.

And again, in the case of *The Covington Drawbridge Company v. Shepherd and others*, 20 How. 232, the same question of jurisdiction was presented, and the rule laid down in the two last mentioned cases fully maintained. After these successive decisions, the law upon this subject must be regarded as settled; and a suit by or against a corporation in its corporate name, as a suit by or against citizens of the state which created it.

It follows from these decisions that this suit in the corporate name is, in contemplation of the law, the suit of the individual persons who composed it, and must, therefore, be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of the last mentioned state. Such an action can not be maintained in a court of the United States, where jurisdiction of the case depends altogether on the citizenship of the parties. And, in such a suit, it can make no difference whether the plaintiffs sue in their own proper names, or by corporate name and style by which they are described.

The averments in the declaration would seem to imply that the plaintiffs claim to have been created a corporate body, and to have been endued with the capacities and faculties it possesses by the co-operating legislation of the two states, and to be one and the same legal being in both states.

If this were the case, it would not affect the question of jurisdiction in this suit. But such a corporation can have no legal existence upon the principles of the common law, or under the decision of this court in the case of *The Bank of Augusta v. Earle*, before referred to.

It is true, that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the states as one corporate body, exercising the same powers and fulfilling the same duties in both states.



Yet it has no legal existence in either state, except by the law of the state. And neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person which exists by force of law, can have no existence beyond the limits of the state or sovereignty which brings it into life and endues it with its faculties and powers. The president and directors of the Ohio and Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they can not be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a circuit court of the United states.<sup>1</sup>

These questions, however, have been so fully examined in the cases above referred to, that further discussion can hardly be necessary in deciding the case before us. And we shall certify to the circuit court, that it has no jurisdiction of the case on the facts presented by the pleadings."

<sup>1</sup>Counsel argued that where the governing power acts and issues its orders, there, if anywhere, is the habitat, the residence, the citizenship of such a corporation, and that this was fairly inferable from *Covington Drawbridge Company v. Shepherd*, 20 How. 231; *Louisville, C. & C. R. R. Co. v. Letson*, 2 How. 497; *Marshall v. The Baltimore & Ohio R. R. Co.*, 16 How. 325.

While the result reached in this case is adhered to, yet the reasoning is somewhat modified in *Railroad Company v. Harris*, 12 Wallace 65, the court saying (82): "*We see no reason why several states can not, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into a single one.*" And again (83): "So far as there is anything in the language of the court in the case of the *Ohio & Mississippi Railroad Co. v.*

*Wheeler*, 1 Black. 297, in conflict with what has been here said, it is intended to be restrained and qualified by this opinion."

This language of the court is, however, itself subject to the criticism that it was *obiter* of the subject; for an examination of the entire opinion shows the real point decided. that the *Baltimore & Ohio Railroad Company*, incorporated in Maryland, has been permitted to extend its lines through and operate in Virginia and the District of Columbia, and may be sued in each of them; not, however, because it is a corporation of them respectively or of either of them, but because the statutes, considered in their entirety, disclose that such permission to there operate was accompanied with the burden of being there sued.

Under these circumstances it is not surprising to find *Thayer*, C. J., in

**Missouri Pacific Railway Co. v. Meeh**, delivering the opinion of himself and his associate judges, Caldwell and Sanborn, Circuit Court of Appeals, 69 Fed. 758, saying: "At this day it must be regarded as settled beyond doubt or controversy, that two states of the union can not, by their joint action, create a corporation which will be regarded as a single corporate entity, and for jurisdictional purposes, a citizen of each state which joined in creating it. One state may create a corporation of a given name, and the legislature of an adjoining state may declare that the same legal entity shall be or become a corporation of that state as well, and shall be entitled to exercise within its borders, by the same board of directors and officers, all of its corporate functions. Nevertheless, the result of such legislation is not to create a single corporation, but two corporations of the same name, having a different paternity."

His citations omit **Railroad Company v. Harris**, 12 Wallace 65; they include **Railroad Co. v. Wheeler**, 1 Black. 286; **Railway Co. v. Whitton**, 13 Wall. 270; **Muller v. Dows**, 94 U. S. 444; **Pa. Co. v. St. Louis, etc., Co.**, 118 U. S. 290; 6 S. C. R. 1094; **Nashua & L. R. Co. v. Boston & L. R. Co.**, 186 U. S. 356; 10 S. C. R. 1004; **C. & N. W. R. Co. v. Auditor**, 53 Mich. 91; 18 N. W. R. 586; **Racine & M. R. Co. v. Farmers L. & T. Co.**, 49 Ill. 831; **Fitzgerald v. Ry. Co.**, 45 Fed. Rep. 812; **Quincy Bridge Co. v. Adams**, 88 Ill. 615.

The conclusions reached in this case (**Missouri Pacific Ry. Co. v. Meeh**), are that the company was chartered in Kansas, Missouri and Nebraska, and when sued in Kansas by a citizen of Kansas, for an injury occurring in Kansas, the defendant was there a domestic corporation and citizen of same state with plaintiff, hence the federal court had no jurisdiction.

## SECTION TWO.

**Fitzgerald v. Missouri, Pacific Ry. Co.**, 45 Federal 812.

**Consolidation is a citizen of each State.**

Suit in state court in Nebraska against the Missouri Pacific Railway Company, removed to federal court on defendant's petition, and remanded.

"It has long been settled law, that when a consolidated company is formed by the union of several corporations chartered by different states, it is a citizen of each of the states which granted the charter to any one of its constituent companies, and when sued in one of those states it can not claim the right of removal on the ground that it is also a citizen of another state." <sup>1</sup> The defendant was formed by the consolidation of

<sup>1</sup> Dill. Rem. Causes, § 104, and cases cited; Mor. Priv. Corp., § 101; Foster's Fed. Pr., § 19.

three corporations, organized under the laws of Missouri, Kansas and Nebraska, respectively. "This makes the consolidated company for all purposes of jurisdiction in the federal courts, a citizen of each of those states."

Although having the same name, directors, line, powers, functions and purpose in three states, "it is not the same corporation in each state, but a distinct and separate entity in each. It is a corporate trinity, having no citizenship of its own, distinct from its constituent members, but a citizenship identical with each. By the consolidation the corporation of one state did not become a corporation of another, nor was either merged in the other." The separate identity of each is not lost by the consolidation; the consolidation is a unit and acts as a whole in the transaction of its corporate business, but "it is not a corporation at large, nor is it a joint corporation of the three states;" "it dwells in three states and is a separate and legal entity in each." "It is conclusively presumed to be a citizen of each of the states whose laws and corporations contributed to its formation. It enjoys in each state all the powers and privileges the corporation there chartered had, and must answer in the courts, and is amenable to the laws of each state respectively, as a corporation of that state."

### SECTION THREE.

#### The author's comments on the last case.

The argument used in the foregoing opinion, though undoubtedly well founded on the numerous citations therein referred to, does nevertheless seem to involve the matter in some needless confusion. The petition for removal recited that the contracts involved had their location in Kansas. Now if, as said in the opinion, each constituent company retains its identity, would it not follow that the plaintiff in Kansas has contracted with the Kansas company, and that when he brings suit in Nebraska, it is the Kansas company which is the defendant? Such would seem to be the result of the court's reasoning. While it is most certainly true that the cause was properly remanded, should this result not have been reached by

some other process, as, for instance, by considering a consolidation to stand to its constituent corporations in precisely the same relation that an ordinary corporation stands to its stockholders, and by applying to a consolidation the same test that is applied to the simple corporation?

No matter of how many it is composed, nor how many steps are taken, the ultimate result must always exist by virtue of some law (if it is a corporation at all). Then, why not deem it a citizen of the state in which that law is found?

Thus in this case, there were three separate corporations: one in Missouri, one in Kansas and the third in Nebraska, citizens of said states respectively. The first and second were consolidated by acts of those two states, and became the Missouri Pacific Railway Co., which new corporation, owing its life to each state, we may admit was a citizen of each. But what followed? This new corporation was, as we infer from language somewhat ambiguous, consolidated under the laws of Nebraska with the Nebraska corporation. Clearly, then, this last result, owing its existence solely to the Nebraska laws, should be deemed a citizen of Nebraska and of no other state, just as any ordinary Nebraska corporation (composed of individuals as constituents) would be deemed a citizen of Nebraska, and not of the various states of which such individuals might chance to be citizens.

#### SECTION FOUR.

**Union Pacific Ry. Co. v. Myers, 115 U. S. 1; 5 S. C. R. 1113:**

##### **Citizenship of a "Federal Corporation."**

The opinion of the United States Supreme Court, in *Union Pacific Ry. Co. v. Myers*, 5 U. S. S. C. R. 1113, holds that the Union Pacific Ry. Co., being organized under an act of Congress, is a corporation of the United States, and entitled when sued in a state court to remove the cause, as it is a suit "arising under the laws of the United States;" for necessarily, anything concerning a United States corporation arises under said laws. Following *Osborne v. Bank*, 9 Wheat. 817-828.

The point does not seem to have been raised or argued in

Myers' behalf (whose suit was brought in a state court in Kansas), that inasmuch as it appeared, indeed, was pleaded by defendant itself, that it was a consolidation of a Kansas road with some others, that therefore it should be deemed a citizen of Kansas as well as of any other state, of which any of the constituent roads are citizens. This point does not seem to have been taken; and hence there is no decision as to the place of defendant's citizenship, or whether it has any at all or not; nor could it have been taken, because in the view of the majority it was a case arising under the laws of the United States, and hence citizenship became immaterial.

The court holds also that the important purposes for which the company was organized make it almost an instrument of government, and that is an additional reason why any suit affecting it necessarily arises under the laws of the United States.

WAITE, C. J., and MILLER, J., dissent, but base it simply on the language of the statute, and say that certain formalities are prescribed when such corporations want to remove causes requiring them to state that they have a defense arising under treaties or law, etc., and that it would have been unnecessary to prescribe these formalities if they had the right of removal by the mere fact of being federal corporations.

#### SECTION FOUR.—CONTINUED.

*Ames v. State of Kansas*, 111 U. S. 449; 4 S. C. R. 437.

Proceedings in *quo warranto* against the Kansas Pacific Railway Company, the directors of the Union Pacific Railroad Company and others; alleging that the latter had usurped the franchises of the former, and were illegally acting as a corporation; also that the former had abandoned its franchises. Defense was made on the grounds that the roads had consolidated in accordance with permission given by certain acts of Congress, and petition and motion was made by the defendants to remove the causes to the federal courts; on motion of the state the causes were remanded; the defendants appeal from the remanding order, and same is reversed. The validity

of the consolidation rests entirely on the acts of Congress, hence the controversy thereon presents a federal question arising under an act of Congress, for, "an act of Congress is the first ingredient in the case—is its origin—is that from which every other part arises."<sup>1</sup> The defendants' asserted rights would be sustained by the one, and defeated by the other, construction of the acts in question; hence, undoubtedly, a case arises under the laws of the United States.<sup>2</sup> *Quo warranto* is now clearly regarded as a civil proceeding and hence removable.

The court then considers the question most exhaustively, whether a state which brings a suit in its own court against a corporation amenable to its own process, is subject to having the same removed to the federal court, and decides the question in the affirmative.

#### SECTION FIVE.

**Nashua & L. R. Co. v. Boston & L. R. Co., 136 U. S. 856; 10 S. C. R. 1004.**

**The foreign constituent remains foreign.**

A railroad incorporated in New Hampshire remains a citizen of that state, and may be plaintiff in a federal court in Massachusetts, although the same persons are also incorporated in Massachusetts into a company of the same name, and by acts of the legislatures of each state both these companies are declared united.

#### SECTION SIX.

**Central Trust Co. v. St. Louis, A. & T. Ry. Co., 41 Fed. 551.**

**Citizenship not affected by consolidation.**

Suit in federal court in Arkansas to foreclose mortgage made by a consolidated company.

A corporation under the laws of Missouri, owning roads in Missouri and Arkansas, is consolidated with a corporation of Arkansas owning a road in that state. The consolidated

<sup>1</sup> *Osborn v. U. S. Bank*, 9 Wheat. 73; *Gold W. & W. Co. v. Keyes*, 96 U. S. 825.      <sup>2</sup> *Railroad Co. v. Mississippi*, 102

<sup>3</sup> *Cohens v. Virginia*, 6 Wheat. 379; U. S. 140.

company thus becomes the owner of all the roads, but its citizenship is not affected. In Missouri it remains a Missouri corporation, and in Arkansas, an Arkansas corporation.

#### SECTION SEVEN.

**St. Paul & N. P. Ry. Co. v. Minn., St. C. & W. Ry. Co., 30 N. W. 432; 36 Minn. 85.**

**The consolidation is considered domestic in Minnesota.**

A corporation was made defendant to a condemnation proceeding, and it was alleged that it "was created by and exists under the laws of Wisconsin and Minnesota," from which allegation the court assumes that it is a corporation formed by the consolidation of a Wisconsin and a Minnesota corporation, pursuant to the Minnesota statute, and hence decides that "it must be deemed a domestic corporation; as it is only by virtue of our laws that it exists as a corporation in this state, therefore it can not be called a non-resident, although its general offices be in the State of Wisconsin;" and service of process must be in accordance with the statutes which apply to domestic corporations.

#### SECTION EIGHT.

**Muller v. Dows, 94 U. S. 444.**

**Same rule applied.**

The Chicago and South Western Railway Company existed in Iowa under the laws of Iowa; another company by the same name existed in Missouri under the laws of Missouri; they consolidated, as by the statutes of each state they were allowed to do; it is held that the consolidated company, when sued in Iowa, is a citizen of Iowa, and when sued in Missouri it is a citizen of Missouri.

#### SECTION NINE:

**Clark v. Barnard, 108 U. S. 436; 2 S. C. R. 878.**

**A second corporation created by legislative recognition.**

The Providence & Plainfield R. R. Co., a corporation organized under the laws of Rhode Island, was consolidated with a



Connecticut corporation and formed the Hartford, Providence & Fishkill Railroad Company, which in turn was sold to another Connecticut company, viz., the Boston, Hartford & Erie Railroad Company. Said sale was ratified by the legislature of Rhode Island, and said company was required to give a bond securing the completion of the road. Such bond was given. It is held that the obligor in said bond is the Rhode Island corporation, and not the co-existing Connecticut corporation, hence, that the bond is not void as being *ultra vires* of the Connecticut corporation. The obligor, if it had no previous existence as a corporation under the Rhode Island laws, "would have become such by virtue of the act in question." The Connecticut corporation, as such, could not act as a Rhode Island corporation, "yet the natural persons who were incorporators might as well be a corporation in Rhode Island as in Connecticut, and by accepting charters from both states, could well become a corporate body by the same name and acting through the same organization, officers and agencies, in each, with such faculties in the two jurisdictions as they might severally confer."

#### SECTION TEN.

**Memphis & Charleston R. Co. v. State of Alabama, 107 U. S. 581; 2 S. C. R. 432.**

##### **A second corporation created by inference.**

The Memphis & Charleston Railroad Company, a corporation organized under the laws of Tennessee, and, consequently, a citizen of Tennessee, received legislative permission to build its line through Alabama. The act of the legislature referred to the company as organized in Tennessee, and then in several sections mentioned it as "said company," authorizing it to locate its line, open subscriptions in Alabama, choose directors, etc. It is also referred to as the company "hereby incorporated." This is held to make it an Alabama corporation. So that when sued in Alabama by a citizen thereof it can not remove the cause to the federal court.

## SECTION ELEVEN.

**Railroad Co. v. Vance, 96 U. S. 450.**

**Grant of corporate powers constitute an additional corporation.**

A railroad corporation of Indiana acquired a lease upon and the management of the road of an Illinois corporation. This is held, at least for the purpose of taxation, to make the lessee an Illinois corporation.

The act was more than a mere license to the Indiana corporation to exert its corporate powers in Illinois; it declares that the lessees shall be a railroad corporation in Illinois, gives the style by which it shall be known, does not say that the corporate powers granted by Indiana shall be exercised in Illinois, but affirmatively confers the same corporate powers as are possessed by another Illinois corporation. The fact that it bears the same name as the Indiana corporation can not change the fact that it is a distinct corporation having a separate existence derived from the legislation of another state.

## SECTION TWELVE.

**Antelope Co. v. Chicago, Burlington & Quincy R. R. Co., 16 Fed. 295 (1883).**

**Status of this defendant.**

Suit by a citizen of Nebraska, in the federal court in Nebraska, against the Chicago, Burlington & Quincy Railroad Company, which pleads in abatement that it is a Nebraska corporation, and that the court has no jurisdiction. Plea overruled; McCrary, J.

The Chicago, Burlington & Quincy Railroad Company was originally incorporated in Illinois, then consolidated with an Iowa corporation, retaining its own name and being regarded as an Illinois corporation; then entered into articles of consolidation with a Nebraska corporation, which provided for consolidating their stock, property and franchises, and making of them one joint stock company, by means of a sale by the Nebraska corporation of all its property, franchises, etc., to the other. In pursuance whereof, the Nebraska corporation did

convey all its property to the other. The statute of Nebraska allowed railroads to merge and consolidate their stocks, making one joint stock company of the railroads thus connected, upon such terms as may by them be mutually agreed upon.

It is argued that these articles of consolidation and the conveyance by the Nebraska company of its franchises and property to the other, makes the latter a Nebraska corporation. The same individuals may constitute different corporations under the same name in different states. A state may require a foreign corporation to become a domestic one as a condition of engaging in business if it see fit to do so.<sup>1</sup> But the legislature of Nebraska has not required the foreign corporation to become a domestic one as a condition precedent to consolidation. The purpose was not to provide for a continuance of both corporations, nor for the dissolution of the Illinois corporation, as that would have been quite beyond the scope of its powers. The statute allowed consolidation on terms mutually agreed on; the sale was to the Illinois company; the intention was that there should be but one company, hence the Illinois company must be that one. This result is not contrary to any statute of Nebraska; the statute of Iowa expressly authorizes consolidation by sale, and nothing appearing to the contrary, it will not be presumed that any statute of Illinois has been violated. The true rule is that where the state does not assume to create a corporation or to require the foreign to become domestic, but allows it to come into the state and transact business, such foreign corporation remains for the purposes of federal jurisdiction a citizen of the state which created it.<sup>2</sup> The defendant therefore is to be regarded as a citizen of Illinois.

### SECTION THIRTEEN.

#### Same topic continued.

Suit commenced in a state court in Iowa against the Chicago, Burlington & Quincy Railroad Company is held to have

<sup>1</sup> Stout v. Sioux City & Pacific R. Co., 3 McCrary 1; S. C., 8 Fed. Rep. 794.  
<sup>2</sup> Missouri, K. & T. Ry. Co. v. Texas & St. Louis Ry. Co., 10 Fed. Rep. 497.

been properly removed to the federal court.<sup>1</sup> Defendant was incorporated in Illinois in 1865, and in 1875 there received the power to acquire roads in adjoining states.

Opinion by SHIRAS, J., is substantially as follows:

The Burlington & Missouri River Railroad Company was incorporated in Iowa in 1853, and in 1872 leased, and in 1875 sold, its road to the defendant, which has ever since run and managed the same; "has exercised the right of eminent domain in Iowa, has transacted business at many places in Iowa, having local establishments and officials in the state." These facts, however, do not establish a consolidation between these two corporations, nor make the latter so far a creation of the laws of Iowa, "that it can not claim to be a non-resident of the state;" it is there a foreign corporation operating under permission of the state. Even if the evidence would show, which it does not, that the once contemplated consolidation had been consummated, "The result would have been the union of the two companies in the work done, but not a consolidation of the original corporations with a new corporate entity; for that is declared by the supreme court to be beyond the power of the legislatures of Illinois and Iowa to accomplish." The purchasing company assumed certain duties, and could have been sued thereon as an Illinois corporation in federal courts of that state, and in turn it could have sued the selling company as an Iowa corporation in the federal courts of that state.

Neither can the defendant be deemed to have become a resident of Iowa by their acquiring property, engaging in business, establishing offices, and exercising corporate powers and franchises in connection therewith.<sup>2</sup>

Nor can the case be within the rule stated in *Fitzgerald v. Railway Co.*,<sup>3</sup> in which "it is held that a company formed by the consolidation of three corporations, and engaged in a

<sup>1</sup> *Conn. v. Chicago, Burlington & Quincy R. Co.*, 48 Federal Reporter 177.

<sup>2</sup> Citing in support of this proposition, *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 10 Supreme Ct. Rep. 1004.

<sup>3</sup> *Booth v. Manufacturing Co.*, 40 Fed. Rep. 1; *Myers v. Murray*, 43 Fed. Rep. 695. See also *Henning v. Western Union Tel. Co.*, 43 Fed. Rep. 97; *Fales v. Ry. Co.*, 32 Fed. Rep. 673 (construing the act of 1887).

<sup>4</sup> 45 Fed. Rep. 812.

common enterprise, is to be deemed a citizen of each state by which the separate corporations were created." As to this, Judge Shiras holds that the consolidation is analogous to a partnership, and that the real ground why the federal court jurisdiction can not be invoked, is that *one* of the partners is a citizen of the state;<sup>1</sup> and he concludes by saying that there is in the principal case nothing like a partnership, but a direct sale from one to the other.

#### SECTION FOURTEEN.

##### Same topic continued.

The Chicago, Burlington & Quincy Railroad Company<sup>2</sup> was originally incorporated to, and did, construct the road from Chicago to Burlington, Iowa; the Burlington & Missouri River Railroad Company constructed its road from Burlington to the western boundary of Iowa; these two roads were consolidated in accordance with the laws of Illinois and Iowa, and formed the Chicago, Burlington & Quincy Railroad Company; thereafter, in 1869, articles of incorporation were filed with the Secretary of State of Nebraska incorporating the Burlington & Missouri River Railroad Company in Nebraska, and soon thereafter this last named company and the last named Chicago, Burlington & Quincy Railroad Company entered into articles of consolidation in accordance with the laws of Iowa and Nebraska, merging the stock of both, and making one joint stock of their capital under the name of Chicago, Burlington & Quincy Railroad Company. On this statement of facts the Attorney-General contended, by way of *quo warranto*, that the last named company was not a domestic corporation in Nebraska, and hence, prohibited from instituting condemnation proceedings, as to which it is provided by section 8, article 11, of the constitution, that "no railroad corporation

<sup>1</sup> This reasoning would seem not applicable to the act of 1887, inas-  
much as by that act a cause, even if  
not separable, is removable on the  
petition of a defendant who is not a  
citizen of the state, although some  
co-defendant may be. See *Hall v.*  
*Chattanooga Agr. Works*, 48 Fed.  
Rep. 599, and cases cited.  
<sup>2</sup> *State v. this defendant*, 41 N. W.  
125 (1883); same ruling in cases against  
*Missouri Pacific R. Co.* and *Chicago,*  
*St. P., M. & O. R. Co.*

organized under the laws of another state or of the United States, and doing business in this state, shall be entitled to exercise the right of eminent domain, or have the power to acquire the right of way, or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this state." The court, though finding that this railroad's attorneys had, from 1880 to 1888, treated it as a foreign corporation, and had removed to the federal courts all suits brought against it, yet finds that in 1888 they, the attorneys, had become convinced that they were not entitled to do so. The court then finds for itself that the road is a domestic corporation, formed in accordance with section 114 of the statutes, which allows any railroad company organized under the laws of Nebraska to unite its road at the state boundary with any other road \* \* \* "and to consolidate their stock, making one joint stock company, and bring the railroads thus connected under one management, \* \* \* said united companies to become one corporation, and said consolidated companies to become merged in the new corporation provided for in the articles of consolidation filed with the Secretary of State, and shall be known by the name therein adopted, and shall, within this state, possess all the powers, franchises, immunities, and be liable to such special restrictions and liabilities as the said consolidated companies were within this state possessed of, or subject to, under any laws of this state peculiarly applicable to them or either of them at the time of such consolidation."

From this provision the court is of the opinion that when a domestic corporation is consolidated with a foreign one, the result is a new corporation placed upon the same legal basis as to rights and restrictions as a domestic one; in fact, the result is a domestic corporation, hence, has the right of condemning property, and has not the right of removing causes. Such resultant corporation, although not originally incorporated in Nebraska in the same manner as individual new corporations are formed, would yet become a body corporate pursuant to, and in accordance with, the laws of this state "as specified in the constitution, although in a legal sense distinct from the corporation in other states through which the road runs, and would in fact be a domestic corporation, formed by a method

other than that of forming new corporations, by which method existing corporations, one domestic, the other not, became a body corporate under the laws of the State of Nebraska and not organized under the laws of another state or of the United States."

### SECTION FIFTEEN.

**Railway Co. v. Whitton, 13 Wall. 270.**

#### **A leading instance of double incorporation.**

The case of *Railway Company v. Whitton*<sup>1</sup> does not involve any consolidation of companies; on the contrary, it is an instance of double incorporation of the same company; but as it is so often referred to in consolidation cases, it may be stated here.

Plaintiff, a citizen of Illinois, sued the defendant company in a *state* court in Wisconsin, for an injury occurring in Wisconsin, and subsequently he, *the plaintiff*, removed the cause to the federal court. The defendant admitted that it was an incorporation organized under the laws of Wisconsin, but insisted also that it was created and existing under the laws of the States of Illinois, Wisconsin and Michigan; that its line of railway was located and operated in part in each of these states, and was thus located and operated at the commencement of the action; that its entire line was managed and controlled by the defendant as a single corporation, having one board of directors and officers; its principal office and place of business in Chicago, and no office for the control or management of the general business in Wisconsin. Hence, it claimed to be a citizen of Illinois, the same as plaintiff, and that the federal court had no jurisdiction. It is held that the defendant must be regarded as a citizen of Wisconsin and not of Illinois, and hence the removal of the cause was proper. It is settled law that a corporation is a citizen of the state where it is created. But it is urged that the defendant, though being thus a citizen of Wisconsin, is also a corporation under the laws of Illinois, and therefore also a citizen of the same state with the

<sup>1</sup> *Railway Company v. Whitton's Administrators*, 18 Wallace 270.



plaintiff. The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such, a citizen of Wisconsin by the laws of that state. It is not *there* a corporation or a citizen of any other state. Being there sued it can only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere.<sup>1</sup>

### SECTION SIXTEEN.

**Racine & Miss. R. R. Co. v. Farmers' L. & T. Co., 49 Ill. 331.**

**The domestic constituent is presumed to be the grantor in a mortgage.**

Bill in Illinois for foreclosing a mortgage made by the Racine & Mississippi Railroad Company; said mortgagor was a consolidation of a Wisconsin corporation and an Illinois corporation. Among other objections to the validity of the mortgage, it was urged that the consolidation act applies only to lines which connect, and that these did not connect, and that there were various irregularities in the consolidation, hence the mortgagor company had no legal existence; but this is overcome by its recognition as such in subsequent legislation. It is also held immaterial that there were defects in the consolidation, as the mortgage is sought to be foreclosed only as to that portion of the property originally belonging to the Racine & Mississippi Railroad Company before the other company was consolidated with it; and said mortgagor company can not deny its title to the property embraced in its mortgage.<sup>2</sup> Neither is it correct to say that the mortgage was by the Wisconsin corporation, and hence unauthorized in Illinois over realty in Illinois. The mortgage was in fact made by the Illinois corporation. There was in truth a Racine & Mississippi Railroad Company in each state; both companies had

<sup>1</sup> Citing *The Ohio & Mississippi property belonged to a corporation Railroad Company v. Wheeler*, 1 "organized under the laws of the Black. 286; *The Railroad Company State of Indiana and State of Ohio.*" v. Harris, 12 Wallace 65. *Kincaid v. People*, 139 Ill. 214.

It has been held proper to aver in <sup>2</sup> *Barbour v. Haines*, 15 Wend. 618; an indictment for burglary, that the *Dew v. Van Ness*, 5 Halstead 102.

a common board of directors, a common seal and consolidated stock; when a mortgage is found executed in this corporate name, by authority of the board of directors, and conveying only the property of the Illinois corporation, it can not be doubted that in executing it, they were acting in their capacity as directors of the Illinois corporation and not of the Wisconsin corporation. To allow it to be said that they were acting in behalf of the Wisconsin corporation, and that hence the mortgage is null and void, "would be a melancholy administration of justice;" and this is so although the scrivener described the mortgagor as a corporation existing under the laws of Wisconsin and Illinois; the consolidation of the two companies, though legal, did but create a community of stock and of interest; it did not convert them into one company in the same way and to the same degree that might follow a consolidation of two companies within the state. Hence, the mortgage by the directors, acting clearly in behalf of the Illinois company and embracing the Illinois property, is held valid.

#### SECTION SEVENTEEN.

**Uphoff v. The Chicago, St. Louis & No. R. Co., 5 Fed. Rep. 545.**

**The domestic constituent is presumed to be the defendant.**

Suit by a citizen of Kentucky, in a state court of Kentucky, for negligently killing plaintiff's husband. Defendant removed the cause to the federal court; motion to remand sustained. Defendant alleged that it is a citizen of Louisiana; plaintiff filed a response, admitting that defendant is a citizen of Louisiana, but averring further that it is also incorporated in and a citizen of Kentucky. The undisputed facts are that there was one company chartered by the laws of Louisiana and Mississippi, another under the laws of Mississippi and Tennessee; the latter was by act of Kentucky,<sup>1</sup> authorized to extend its line through Kentucky, and was "declared a body politic and corporate," etc. In November, 1877, the two corporations aforementioned were consolidated into one by legislation, in Louisiana, Mississippi and Tennessee, and later,<sup>2</sup> Kentucky rat-

<sup>1</sup> March 18, 1872, c. 585.

<sup>2</sup> March 11, 1878, c. 895.

ified the former act and the consolidation, and chartered the new consolidation in Kentucky.

Opinion by HAMMOND, D. J., in effect as follows:

The test in these cases is, did the legislature intend to license a foreign corporation to do business here, or did it create a corporation here by adopting one chartered in another state; if so, its status is the same as if originally incorporated here.<sup>1</sup> The intent is to be deduced from a proper construction of the statutes. The first act may not be plain, but the latter removes all doubt and clearly makes the defendant a Kentucky corporation by adoption, at least for all purposes of jurisdiction.

This jurisdiction is not affected by the fact that the defendant had its original incorporation, and still has it, elsewhere. A corporation can not be a "citizen," but by a fiction, a corporation is conclusively presumed to be a citizen of the state which creates it, because all its stockholders are conclusively presumed to be citizens thereof; hence defendant would be presumed a citizen of Louisiana, were it not also shown on the record that it has in fact been incorporated in Kentucky; hence, these same fictions *conclusively* presume it to be a citizen of Kentucky. "Hence, while we may know that this adoption by Kentucky of a non-resident corporation, composed of citizens of another state, has the effect to create a corporation not composed of citizens of Kentucky, we must conclusively presume that they are."<sup>2</sup> The fact that these incorporators have charters in several states does not change the result; in each they are conclusively presumed to be citizens of that state, *and of that state alone*.

A corporation may act elsewhere, but resides only in the state which created it.<sup>3</sup>

<sup>1</sup> Railroad Co. v. Harris, 12 Wall. 65; Railroad Co. v. Wheeler, 1 Black. 286; Railway Co. v. Whitton, 13 Wall. 270; Muller v. Dows, 94 U. S. 444; Ex parte Shullenberger, 96 U. S. 369; Railroad v. Vance, Id. 450; Williams v. Railroad Co., 3 Dill. 267; Wilson Co. v. Hunter, 11 Chi. Leg. News, 207.      <sup>2</sup> Railroad v. Letson, 2 How. 497; Marshall v. Railroad, 16 How. 314; Muller v. Dows, 94 U. S. 444.      <sup>3</sup> Bank of Augusta v. Earle, 13 Peters, 519; Marshall v. Railroad, 16 S. 369; Railroad v. Vance, Id. 450; How. 828; Dodge v. Woolsey, 18 How. 831; Wheeling v. Baltimore, 1 Hughes 90.

It has been held by the circuit court in Indiana that the fact of the consolidation can not oust the federal jurisdiction, provided the adverse party be a citizen of another state than that in which the suit is brought.<sup>1</sup> In Pennsylvania the circuit court remanded a cause under circumstances precisely like the case now under consideration.<sup>2</sup> The matter is perplexing. The plaintiff may be said to be suing a Kentucky corporation, but with it three other corporations as well; because if recovering a judgment she may seek therewith to conclude the defendant in the other states in which it is chartered.

However, plaintiff in her declaration does not aver in what capacity she pursues the defendant; defendant *assumes* that it is being sued as a Louisiana corporation, but it might just as well be assumed that she has sued the Mississippi, Tennessee or *Kentucky* corporation. A plaintiff may ordinarily choose the party to be sued; in the absence of a showing of a contrary intent it is a fair inference that she chose the Kentucky corporation; had she called it a Louisiana corporation perhaps the right of removal might exist. The court, sitting in Kentucky, finds here a corporation under the laws of Kentucky sued in the courts of that state, and should not assume in favor of its jurisdiction that another corporation is the one sued; it should rather be assumed that the *home* corporation is the one sued.

#### SECTION EIGHTEEN.

**Paul v. Baltimore & Ohio R. R. Co., 44 Fed. 513.**

**A foreign consolidation is held to be domestic.**

Suit in a state court of Indiana by a citizen of Indiana against the Baltimore & Ohio & Chicago Railroad Company, which removed the case to the federal court. Plaintiff's motion to remand is sustained. The affidavits and motion to remand show that the defendant is a citizen both of the State of Ohio and of the State of Indiana, duly formed by the consolidation in 1876, pursuant to the laws of the States of Ohio and Indiana, of two several railroad corporations, namely, one of the

<sup>1</sup> St. Louis Railroad v. Indianapolis Railroad, 12 Chi. Leg. News, 73.

<sup>2</sup> Johnson v. Railroad, 1 Am. L. Rev. (N. S.) 457.

State of Ohio known as the Baltimore, Pittsburgh & Chicago Railway Co., Ohio Division, the other of the State of Indiana known as the Baltimore, Pittsburgh & Chicago Railway Co., Indiana Division. Defendant's counsel contended that inasmuch as the statutes of Indiana authorized its railroads to connect with those of adjoining states, and also to be there consolidated under the laws of adjoining states,<sup>1</sup> but made no provision for the incorporation of the consolidated company in Indiana, therefore it had become an Ohio corporation exclusively, its certificate of incorporation having been executed in accordance with the Ohio statutes,<sup>2</sup> its consolidation having been made thereunder, and the contract of consolidation having been executed in Ohio. To this very reasonable contention the court responds briefly by referring to the several precedents,<sup>3</sup> which it summarizes as holding that notwithstanding the consolidation, "the separate identity of each as a corporation of the state in which it was created and as a citizen of that state" was not lost. The suit brought in Indiana was necessarily against the Indiana corporation, and the Ohio body, or the defendant describing itself as an Ohio body, of course had no right to ask a removal.

### SECTION NINETEEN.

#### The author's comments on the last case.

It must be admitted that this decision is the logical outgrowth of the precedents on which it relies, but there is certainly ground for questioning its, or their, correctness.

All corporate existence rests simply on a legal fiction; thus a corporation is conclusively presumed to be a citizen of the state in which it is incorporated (because by a legal fiction *all its stockholders* are conclusively presumed to be citizens of that state). Why, then, should not the Baltimore & Ohio & Chicago Railroad Company be deemed to be a citizen of Ohio, that

<sup>1</sup> Section 8971, Revised Statutes of Indiana. 1004 (three justices dissenting, and one not sitting); *Muller v. Dows*, 94

<sup>2</sup> Section 8879 to 8892, inclusive, Revised Statutes of Ohio. U. S. 444; *Railroad v. Whitton*, 18 Wall. 271; *Burger v. Railroad Co.*, 22

<sup>3</sup> *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 186 U. S. 358; 10 S. C. R. Federal 561.

being the only state in which *it* was incorporated? Why not conclusively presume that *all its stockholders* (be they natural or artificial persons) are citizens of Ohio? Admit, for the sake of the argument, that the constituent company, namely, the Baltimore, Pittsburgh & Chicago Railway Company, Indiana Division, is still in existence, and yet, inasmuch as the plaintiff's dealing was not with that company at all, but was with the defendant company, and as he sues the defendant company, why should the constituent company be at all concerned in the matter?

The question is simple in itself, and on principle would seem to be thus solved: Individuals (citizens of Ohio) form a corporation in Ohio; it is an Ohio corporation. Individuals, some of them citizens of Iowa and others of Ohio, incorporate in Ohio; it is an Ohio corporation. Corporations of Ohio form a consolidated corporation in Ohio; it is an Ohio corporation. A corporation of Iowa and one of Ohio incorporate by way of consolidation in Ohio; *the result* is certainly as much an Ohio corporation as though the individuals from Iowa should join with Ohio citizens in incorporating in Ohio. Such consolidated Ohio corporation can, of course, under the permission of the Iowa laws or the comity of that state, transact business in Iowa, just as any simple (non-consolidated) Ohio corporation may do and does, but that fact would not make it an Iowa corporation. Nor in the principal case should the Baltimore & Ohio & Chicago Railroad Company, formed exclusively in Ohio, be deemed to be, *as to any business by it transacted*, an Indiana corporation, simply because one of its constituents is, or once was, an Indiana (artificial) person. Certainly the "laws of Ohio have no operation in Indiana," but still an Ohio simple (non-consolidated) corporation may transact business in its corporate capacity in Indiana, and be respected as such. Suppose, when making the consolidation, the constituent Indiana Company had reserved a fund of \$100,000 for division among its own stockholders, and had transferred all the rest of its property to the defendant (the consolidation) and was not, by statute or otherwise, to be liable for debts or liabilities of the defendant thereafter incurred, and suppose the demand against the defendant (the consolidation) was for injuries sustained by plaintiff whilst being carried in Ohio, on cars and

tracks belonging to the consolidation, on a ticket issued by it, and he brings his suit in Indiana (as he may against any foreign corporation there found), would it be held in such a case that the original Indiana company is the real defendant and that a judgment, if obtained, would be enforceable against said \$100,000? or would it not rather be held that the original company and the consolidation are distinct legal entities upon the question of responding to a judgment? and if so, why not also upon the question of jurisdiction as dependent upon citizenship?

But one more phase remains, and that is in case the consolidation is incorporated in Ohio, and the same consolidation is also incorporated in Indiana; in such case, no doubt, it is in each state a corporation of that state, and when sued in either will be there deemed to have been sued in its corporate capacity there bestowed upon it; probably for the very good reason (generally existing, though not especially laid down in the decisions) that the transaction out of which the suit grows occurred there.

Such was the *Whitton case*;<sup>1</sup> the defendant was consolidated by union of a Wisconsin corporation and an Illinois corporation by acts of Wisconsin and of Illinois, and was sued in Wisconsin for a death occasioned in Wisconsin, and it is on these facts that the court uses this language: "In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen of Wisconsin by the laws of that state. It is not *there* a corporation or a citizen of any other state. Being there sued, it can only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere."

Hence, the defendant was held to be a Wisconsin corporation. But suppose it had never been incorporated in Wisconsin, but only in Illinois? Would the court then say that "in Wisconsin the laws of Illinois have no operation?" Certainly it would not so say, for it would be tantamount to prohibiting corporations from transacting business, or suing or being sued in any other state than the one which creates them. Or suppose, again, that *Whitton* had brought his suit in Illinois for the death of his wife, occasioned in Wisconsin as aforesaid,

<sup>1</sup> *Railway Company v. Whitton*, 13 Wall. 270.



would not the defendant be the Wisconsin corporation, or at all events the consolidated company as representative thereof? Certainly, as long as the consolidation of corporations of different states, by concurrent and equivalent legislation of each of the states, is held not to create one corporation, "but a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio,"<sup>1</sup> so long it should also be held that *that entity* with which the business was transacted is the one which should respond to the suit, *wherever* it be brought.

There seems to be just one case, which, though not often cited, and itself relying on no precedents, carries to their logical sequence the questions under discussion; it is given in the next section :

#### SECTION TWENTY.

**Newport & Cincinnati Bridge Co. v. Woolley, 78 Kentucky 523.**

**Incorporation in two states makes a quasi-partnership.**

The States of Ohio and Kentucky each created a corporation, which was given the same name; each state gave to its own creation the usual and full corporate powers; the purpose was to build a bridge over the Ohio river; either corporation, had there been legislation only in its own state, would have had full power to build to the limit of that state's territory.

This is a suit in the state court in Kentucky against the corporation created by the laws of Ohio.

It is absurd to suppose that the result of the two legislative acts is one corporation; each state must act for itself and completely. The creative power of one state can neither be added to nor subtracted from by another.

"These corporations are distinct, controlling the same substance in a joint business, and appellant's (defendant's) residence is alone in Ohio. A corporation can not have two domiciles or residences at the same time." It obtains a residence not by its own act, but by legal authority, which fixes the requisites

<sup>1</sup> Ohio & Mississippi Railroad Company v. Wheeler, 1 Black. 286, 298.

<sup>2</sup> Bank of Augusta v. Earle, 18 Peters 521.

of residence; and it retains a residence so long as its legal existence lasts in the state whence it received it. The appellant was properly sued as a non-resident of Kentucky."

The two corporations have a common purpose, namely, the operation of the bridge; and each is bound by any act in that respect done by the other, "in the legitimate prosecution and protection of their joint business as copartners are bound." The employment of appellee by the Kentucky corporation to attend to their joint interests will sustain a judgment against either for the value of his services.

### SECTION TWENTY-ONE.

**Burger v. Grand Rapids & Indiana R. R. Co., 22 Fed. Rep. 561.**

**Consolidation recognized as one entity though created by laws of different states.**

Suit in the federal court in Indiana by plaintiff, a citizen of Indiana, against the defendant, the Grand Rapids and Indiana Railroad Company, which plaintiff alleges is a corporation organized under the laws of Michigan and a citizen of Michigan. The injury was sustained in Michigan. Defendant pleads to the jurisdiction, and alleges that it is also a citizen of Indiana, being a consolidated body, composed of one corporation, created in Michigan, and of another created in Indiana, which two were consolidated and merged in 1857 under the laws of both states into one body, viz., the defendant. This plea is held good. The court states that the precise question has never been decided, but finds opinions expressed in analogous cases.<sup>1</sup> In other cases it is held that a corporation organized and consolidated under the laws of two states may describe itself as a citizen of only one, ignore the statute of the other state, and sue a citizen of the latter state in the federal court there sitting; language pointing to the

<sup>1</sup> Uphoff v. Chicago, St. Louis & N. Fed. Rep. 458; S. C., 19 Fed. Rep. 804. O. R. Co., 5 Fed. Rep. 545; Nashua & (For reversal of this (Nashua) case, L. R. Co. v. Boston & L. R. Corp., 8 see 10 S. C. R. 1004.)

same conclusion, and, if taken literally, having the same meaning, is used in the other case.<sup>1</sup>

At common law a corporation can not migrate; it can act and sue or be sued only in the sovereignty which creates it; but by statute it may do business elsewhere, subject to such terms as may be imposed, among which are the liability to be sued, assent to which is presumed from the fact of doing business there.

It has been said<sup>2</sup> that several states may unite in creating the same corporation, or in combining several pre-existing corporations into a single one, which would have the same jurisdictional result so far as federal courts are concerned, as that of a copartnership of individual citizens residing in different states.<sup>3</sup>

The Indiana statutes<sup>4</sup> provide for suits against foreign corporations, but it is doubtful whether the defendant which has a *chartered* existence in Indiana as well as in another state is embraced among "corporations not incorporated or organized in this state" (Indiana). The defendant does not appear to have been treated in Indiana as a foreign corporation; the State Supreme Court decisions tend to hold in harmony with the *Whitton* case, that in Indiana the defendant can be sued only as a citizen of Indiana, hence the defendant has a right to insist that in either state it can be sued only as a domestic corporation. If this is inconsistent with the cases cited which allow such a corporation to declare itself a creature of one state and ignore its existence in another, and there bring suit as a foreign corporation, it is because of the common law doctrine which exempts a corporation from suit in a state other than that of its creation, which doctrine as to this class of corporations has not been modified either by congressional or

<sup>1</sup> *St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R. Co.*, 9 Biss. 144; *Chicago & North Western R. Co. v. Chicago & P. R. Co.*, 6 Biss. 219; *Railway Co. v. Whitton*, 18 Wall. 271, 283; *Muller v. Dows*, 94 U. S. 444, 448.

<sup>2</sup> *Railroad Company v. Harris*, 12 Wall. 65.

<sup>3</sup> The court refers on this point also

to *St. Clair v. Cox*, 106 U. S. 350; *S. C.*, 1 S. C. R. 354; *Ex parte Shollenberger*, 96 U. S. 369; *Railroad Co. v. Koontz*, 104 U. S. 5; *Life Ins. Co. v. Woodworth*, 111 U. S. 138; *S. C.*, 4 S. C. R. 364; *Railroad Co. v. Railroad Co.*, 10 Fed. Rep. 497; *Callahan v. Railroad Co.*, 11 Fed. Rep. 536.

<sup>4</sup> Rev. Stat., 1881, Secs. 3022, 3030.

state legislation. Having a chartered existence in Indiana, the defendant is not among "corporations not incorporated nor organized in this state," hence not thereby subject to suit; it is therefore still within the common law rule. The question is involved in perplexity. The right of such a body to sue is more doubtful than the exemption from suit, and has not yet been recognized by the supreme court, though declared on the circuit bench in the case cited. The conclusions reached are fortified, perhaps, by the consideration that if a judgment could be given in this action against the defendant as a Michigan corporation it would be binding in this state as well as in Michigan, and might be enforced by execution issued directly against the property of the company here. The property of one company is the property of the other. The fact that the injury occurred in Michigan is not material to the question of jurisdiction.<sup>1</sup>

#### SECTION TWENTY-TWO.

**Quincy R. R. Bridge Co. v. Adams County, 88 Ill. 615.**

##### **Status of a bridge company.**

Suit in Illinois by a county against the Quincy Railroad Bridge Company to recover amount of tax against its capital stock. Defendant insisted that it was not a corporation created under the laws of Illinois, and hence not subject to the tax. Defendant had been incorporated in Illinois;<sup>2</sup> also, by an act of the legislature of Missouri, the Quincy Bridge Company was incorporated. Both corporations had the common object of building a bridge across the Mississippi river, and each required the consent of both states as also of congress for that purpose, as neither state had jurisdiction over the whole river. November 20, 1866, these two companies signed articles of consolidation which were filed with the secretary of state of Illinois, and which were approved by the legislature of Illinois,<sup>3</sup> and the consolidation was thus effected. Said act of ap-

<sup>1</sup> *Horne v. Boston & M. R. R.*, 18 Fed. Rep. 50.

<sup>2</sup> Act of Feb. 10, 1858, renewed Feb. 15, 1865.

<sup>3</sup> February 6, 1867: "An act to legal-

ize the Quincy Railroad Bridge Company and to facilitate and encourage the construction of a railroad bridge over the Mississippi river at Quincy."

proval recognizes the consolidation of these independent companies and their origin, and the name Quincy Railroad Bridge Company, and confers upon it the powers granted to the railroad bridge company by the acts of 1853 and 1865. Nothing is wanting to make the appellant a corporation created by the laws of Illinois. The fact that it also derived an equal part of its powers from the sovereign State of Missouri can make no difference; it does not follow that therefore the two corporations, joined now in one, "are not a corporation created under the laws of either state." The answer to such contention is that the legislatures of Illinois and Missouri can not act jointly, nor can any legislation of the latter have the least effect in creating a corporation in the former state. Appellant's corporate existence in Illinois springs from the legislation in Illinois which, by its own vigor, performs the act. The two states have no power to unite in passing any legislative act; they can not fuse themselves into a single sovereignty and as such create a body politic which shall be a corporation of the two states without being a corporation of each state or of either. Appellant's only possible status, acting under charters from two states, is that it is an association incorporated in and by each of the states, and when acting as a corporation in either of the states it acts under the authority of the charter of the state in which it is then acting, and that only, the legislation of the other state having no operation beyond its territorial limits. We do not and can not understand that appellant derives any corporate powers from the legislature of the state of Missouri, but wholly and entirely from the general assembly of this state. Consequently they are embraced in the revenue act.

### SECTION TWENTY-THREE.

**Chicago & Western I. R. Co. v. Lake Shore & M. S. Ry. Co., 5 Fed. 19.**

#### **Status of the Lake Shore & Michigan Southern Ry. Co.**

A railroad corporation created under the laws of Illinois was, under authority of the laws of that state and of Indiana, consolidated with a corporation of the latter state, and the consolidated company thus formed was then consolidated with a com-

pany created by the laws of Michigan, and this again with companies created under the laws of New York and of other states, and formed the Lake Shore & Michigan Southern Railway Company, owning a line from Buffalo to Chicago. The property in controversy was conveyed to one of the consolidated corporations created between the date of the original corporation of the State of Illinois, and of the consolidated corporation which was the result of the legislation of the different states referred to. Suit for the same is brought by an Illinois corporation against the said Lake Shore & Michigan Southern in the state court of Illinois, which removes the cause to the federal court, claiming that it is a New York corporation. Motion to remand is granted by Drummond, C. J., saying, in effect, the question is whether, when a corporation is created by the laws of one state, and then becomes consolidated with corporations of other states, by virtue of the laws of the state of its creation and of those other states, and then changes its name and is sued in a state court of its creation by a corporation of the same state, one of the corporations created by the laws of another state can go into the state court and have the cause removed to the federal court.

It must be assumed that the suit was meant to be against the Illinois corporation. The laws of the other states have no force here; the Illinois corporation is, in Illinois, the sole representative of the others. The corporation of each state, while an integral part of the consolidated corporation, is still each a legal entity, existing by virtue of the laws of its creation. The court distinguishes a case<sup>1</sup> in which the bill was filed by an Illinois corporation, against corporations of Indiana and Pennsylvania, the Indiana corporation being consolidated, it is true, with the said Illinois corporation (plaintiff), in which the federal jurisdiction was upheld; and shows that the integral parts of consolidations may be adversaries in the federal courts, if they are of different states, but can not be when, as in the principal case, the controversy is between the plaintiff and an integral constituent of the consolidation, both Illinois corporations; such a controversy is in part only between the corporation plaintiff and the cor-

<sup>1</sup>The St. Louis, Alton & T. H. R. Co. v. The Indianapolis & St. L. R. Co., 12 Legal News 73.

poration defendant that seeks the removal. Another case<sup>1</sup> is distinguished as being one in which the plaintiff, although consolidated with a corporation of Illinois, sued as a corporation of Wisconsin. The principle contended for is to the effect that because a person is sued in a state court by a citizen of that state, and because a citizen of another state is jointly interested with him (the defendant), that therefore the non-resident citizen may remove the cause; this principle can not be maintained.

### SECTION TWENTY-FOUR.

**Graham v. Boston, Hartford & Erie R. Co., 118 U. S. 161; 6 S. C. R. 1009.**

**Authority to purchase may amount to an act of incorporation.**

Bill by a stockholder to set aside a mortgage, alleged to be invalid because the mortgagor was not a New York corporation, hence, that the meeting authorizing the mortgage, having been held in New York, its proceedings were null and void. The court holds, however, that it was a New York corporation, and that the mortgage is valid.

The circumstances were as follows: The property in question belonged to two New York corporations, which were by act of legislature<sup>2</sup> authorized to sell the same to the Boston, Hartford & Erie Railroad Company, which had not to that time been a New York corporation. The act provided that on filing the certificate of purchase with the secretary of state the purchasing company should be vested with all the property and franchises, and the rights of charter, and may have and use the same in their own right and name, and have all the rights that the corporation making the sale had at the time to construct and operate a railway. The act professed to be an act to consolidate said three roads. As a purchaser of what this act authorized to be sold to it, the company purchasing became a New York corporation by its then existing name. The case comes directly within a prior ruling,<sup>3</sup> which holds that the same company became, in Rhode Island, a Rhode Island cor-

<sup>1</sup> The Northwestern Ry. Co. v. The Chicago & Pacific R. Co., 7 Legal News 57.

<sup>2</sup> Laws N. Y. 1864. c. 385, p. 884.

<sup>3</sup> Clark v. Barnard, 108 U. S. 436, 448; S. C., 2 S. C. R. 878.



poration so far as concerned property by it bought there under similar legislation from a consolidated corporation, composed of a Rhode Island and a Connecticut corporation.

The mortgagor company evidently acted under the New York statute above referred to; no other charter is pretended to have existed from that state; the mortgage is recognized in subsequent legislation.<sup>1</sup> A meeting in one of several states of the stockholders of a corporation chartered by all those states is valid in respect to its property. Whether it be or be not true that the act of the shareholders had outside the state, is void,<sup>2</sup> there is no principle requiring the stockholders of this consolidated corporation to meet in more than one of the states in which it has a domicile, in order to establish the validity of a corporate act. The mortgagor was chartered by its name by the legislature of Connecticut in 1863; thereafter it became a corporation in Massachusetts and in Rhode Island by legislation in each; thereafter the Southern Midland Railroad Company conveyed all its franchises and property to the mortgagor, being the same franchises and property which said Southern had purchased from another corporation, chartered under the laws of Massachusetts, Connecticut and New York; and thereafter the mortgagor company acquired the franchises and property of still another company created under the laws of New York, Rhode Island and Connecticut. The mortgagor corporation, therefore, though made up of distinct corporations, chartered in different states, had a capital stock which was a unit, and only one set of shareholders, who had an interest, by virtue of their ownership of shares of such stock, in all of its property everywhere. In its organization and action and the practical management of its property it was one corporation, having one board of directors, though, in its relations to any state, it was a separate corporation, governed by the laws of that state as to the property therein. It therefore had a domicile in each state and could hold meetings therein so as to bind the corporation in respect to its property everywhere.<sup>3</sup> Moreover, the proceedings resulting in the mortgage were ratified by legislation in each of the states; thus the irregularity, if any there was, was

<sup>1</sup> Laws N. Y., May 21, 1873, c. 550, p. 861.

<sup>2</sup> Bridge Co. v. Mayer, 81 Ohio St. 817; Pierce, R. R., 20.

<sup>3</sup> Miller v. Ewer, 27 Me. 509.

rectified, and there was power so to do, for the four states. acting together for such purpose, could have authorized in advance the holding of the meeting in New York.<sup>1</sup>

### SECTION TWENTY-FIVE.

**Guinault v. Louisville & N. R. Co.,** 41 La. Ann. 571; 6 Southern 850.

**Petition for removal must negative the possibility of double citizenship.**

Suit in the state court of Louisiana by a citizen of that state against the Louisville & N. R. Co. Defendant asked to remove the cause to the federal court, alleging itself to be a citizen of Kentucky. The lower court granted the removal; the supreme court reverses this action, holding that the application for removal was insufficient. The petition of plaintiff had alleged that the defendant was incorporated under the laws of Louisiana; therefore the defendant's petition for removal should have alleged and shown that the defendant was not domiciled in Louisiana. An affidavit that a natural person is a citizen of one state excludes the idea that he is a citizen of another state; he can have but one domicile. But a corporation may be created by the laws of several states, become a distinct corporation in each and domiciled therein, and may be sued as such distinct corporation in the state in which it has been incorporated, and in which it has a domicile.<sup>2</sup> The defendant's affidavit states that it is a citizen of Kentucky, but it fails to contradict the plaintiff's sworn allegation in his petition that it was incorporated by the legislature of Louisiana. These statements do not conflict; the defendant may be a citizen in each state; if they be considered as contradictory and destructive, there would then remain no evidence of citizenship of defendant as averred in the affidavit for removal. Cause reversed and remanded with leave to defendant to show in the court below that it is not domiciled in Louisiana.

<sup>1</sup> Grenada Co. v. Brogden, 112 U. S. R. Co., 5 Gray 162; Howe v. Freeman, 261; S. C., 5 S. C. R. 125; Anderson v. 14 Gray 566.

Santa Anna Tp., 116 U. S. 356; S. C., <sup>2</sup> Desty, Rem. Causes, 66.  
6 S. C. R. 413; Shaw v. Norfolk Co.

## SECTION TWENTY-SIX.

**Pacific Railroad v. Missouri Pacific Ry. Co., 23 Federal 565.**

**Status of the Missouri Pacific Ry. Co.**

Suit in state court in Kansas removed to federal court; motion to remand granted.

Plaintiff is a Missouri corporation, defendant is a consolidated corporation formed by the union of three Missouri and three Kansas corporations. The property in controversy was derived through one of the Missouri corporations. Corporations are not citizens, but all their stockholders are conclusively presumed to be citizens of the state which creates them; hence, the plaintiff is deemed to be a citizen of Missouri, although it has its offices and place of business in New York, and had none in Missouri for five years past. It does not, for jurisdictional purposes, become a citizen of New York by establishing its headquarters there and failing to keep an office in Missouri.<sup>1</sup>

There is more difficulty as to defendant's status. It is undoubtedly a single corporation, consolidated under the laws of both states, the co-operating legislation of both being necessary. It has been said, "We see no reason why several states can not, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into one."<sup>2</sup> But the question remains, of which state is such corporation a citizen? Of both, or of either?

The fiction that all the stockholders are conclusively presumed to be citizens of the state creating the corporation can not be here applied. The consolidated company can not point to the laws of either state as the source of its being; to show that it has a corporate being it must invoke the statutes of both states; it can not claim to be a citizen of each state, because, by the law of Kansas, under which the consolidation

<sup>1</sup> Railway Co. v. Whitton, 18 Wall. 270; Railroad Co. v. Letson, 2 How. 65; Railroad Co. v. Maryland, 10 497; Marshall v. Railroad Co., 16 How. 892.  
How. 814; Railroad Co. v. Wheeler, 1 Black 297; Covington Draw Bridge Co. v. Shepherd, 20 How. 232.

<sup>2</sup> Railroad Co. v. Harris, 12 Wall.

must have taken place, the several companies were authorized "to consolidate and form *one* company," so that the consolidated company must be regarded as a unit. The stockholders of three companies were conclusively presumed before the consolidation to be citizens of Kansas; and of the other companies, to be citizens of Missouri, and it can not be presumed that by the consolidation they all suddenly became citizens of one of these states. And certainly there is no reason to presume that they all became citizens of Kansas. The case is not like where an existing corporation of one state obtains the right to do business in another; remaining thus the same corporation with enlarged powers.<sup>1</sup> Or, is distinctly and separately incorporated in another state.<sup>2</sup> Nor is it a case in which a corporation of one state is authorized to sell, assign and transfer its property and franchises to a corporation in another state; in such cases the two corporations are merged into one, and that one is the corporation which purchases the property and franchises of the other.<sup>3</sup> The present case is analogous to and concluded by the Wheeler case, *supra*, in which the plaintiff declared itself to be a corporation created by the laws of the States of Ohio and Indiana, whereupon the court regarded it as the suit of the individuals composing it, and presumed these individuals to be citizens of Ohio and of Indiana, and hence could not bring suit on the ground of diversity of citizenship in the federal court in either state against a citizen thereof.

**Same topic: in state court.**

In *Trester v. Missouri Pacific Ry. Co.* (Neb.), 49 N. W. 1110, the status of this company is further defined. Missouri Pacific Railway Company, of Nebraska, filed and recorded its articles of incorporation in Douglas county and with secretary of state of Nebraska, and became a domestic corporation in Nebraska, hence was qualified to institute condemnation proceedings; it thereafter was consolidated with the Missouri Pacific Railway Company, a consolidation formed of a Missouri and Kansas corporation. These last articles of consolidation fixed the

<sup>1</sup> *Railroad Co. v. Harris*, 12 Wall. 65.      <sup>2</sup> *Antelope Co. v. Chicago, B. & Q. Ry. Co.*, 4 McCrary 46; S. C., 16 Fed.

<sup>3</sup> *Railway Co. v. Whitton*, 18 Wall. 270. Rep. 295.

name as Missouri Pacific Railway Company, were duly filed, and that company (defendant in this suit) has been held to be a domestic corporation in Nebraska.<sup>1</sup> “By the act of consolidation the two companies were merged in the new corporation thus formed, and all the powers, rights and franchises of the original corporations were transferred to the new company. That the corporate name adopted for the new company is the same as that of one of the consolidating companies which was organized under the laws of another state, did not make the new corporation a foreign corporation. The consolidated company has a separate and distinct corporate existence in each of the states through which the road is located, and while it has but one board of directors, so much of the road and the property of the company as is in this state is governed and controlled by the laws of this state. It has the same power to acquire real estate in this state by the right of eminent domain, as if it had been originally incorporated in this state.”

#### SECTION TWENTY-SEVEN.

**County of Allegheny v. Cleveland & Pittsburgh R. R. Co., 51 Pa. St. 228.**

**Defendant is a separate corporation in each state.**

Action in debt brought by the county of Allegheny against the Cleveland & Pittsburgh Railroad Company; defendant filed petition to remove cause to the federal court, claiming to be an Ohio organization. Application refused; affirmed.

The defendant was first incorporated by the State of Ohio and then by Pennsylvania. It became thus a separate corporation in each state; this raises the conclusive presumption that the members of the corporation are citizens of both states;<sup>2</sup> hence a suit in Pennsylvania by a citizen thereof against this corporation is conclusively presumed to be against citizens of Pennsylvania as well as of Ohio not removable.

<sup>1</sup>State v. Railway Company, 25 Nebraska 156, 41 N. W. R. 127, construing section 114, c. 16, Comp. St., providing for consolidation of domestic with foreign corporation.      <sup>2</sup>Ohio & Miss. R. R. Co. v. Wheeler 1 Black 286.

## SECTION TWENTY-EIGHT.

**James v. St. Louis & S. F. Ry. Co., 46 Fed. 47.**

**A corporation becomes domestic by recording charter.**

Suit by a citizen of Missouri brought in the Federal Court of Arkansas against the St. Louis & San Francisco Ry. Co., for injury caused in Missouri; jurisdiction is sustained.

Opinion by PARKER, J., substantially as follows:

The defendant was originally incorporated in Missouri, and is a citizen of that state; but it is also a citizen of Arkansas, because it has complied with the statute which declares that any foreign corporation which has leased or purchased a road in Arkansas shall within sixty days file with the secretary of state of Arkansas a duly certified copy of its charter, and it "shall thereupon become a corporation of this state." The question in all the cases of this kind is one of legislative intent, and in this case it is clearly the intent to make this foreign corporation to be a domestic one, and not merely to give it permission to operate in Arkansas.<sup>1</sup> Hence, plaintiff, a citizen of Missouri, can sue this defendant, an Arkansas corporation, in the federal court of Arkansas.

<sup>1</sup> Citations: 1 Black 286; 13 Wall. 270; 96 U. S. 450; 107 U. S. 581; 2 S. C. R. 432; 118 U. S. 290; 6 S. C. R. 1094; 122 U. S. 391; 7 S. C. R. 1254; 118 U. S. 161; 6 S. C. R. 1009; 108 U. S. 437; 2 S. C. R. 878; 5 Fed. 545; 8 Fed. 194. Examine, however, in this connection, *Markwood v. Southern Ry. Co.*, 65 Fed. Rep. 817, holding that permission to do business in a state does not make a foreign corporation domestic, although the statute speaks of their becoming incorporated, and says they shall be deemed corporations of the state, requires them to record charter and makes other similar provisions (exhaustive opinion and citations).

The words, "is hereby incorporated," applied to individuals, are construed to constitute a present grant of corporate power. *St. Joseph, &c., Co. v. Shambaugh (Mo.)*, 17 S. W. R. 581. *Rooza v. St. Joseph Co. (Mo.)*, 21 S. W. R. 1124.

## SECTION TWENTY-NINE.

**Same defendant has not lost right to remove cause.**

The same corporation came again before the same court as follows:<sup>1</sup>

Suit in the state court of Arkansas by a citizen of that state for injuries sustained in Missouri, held, properly removed.

Opinion by PARKER, J., substantially as follows :

The defendant was originally incorporated in Missouri and has also become, by statute of Arkansas and by filing its articles, a domestic corporation in Arkansas.<sup>2</sup> "But did this act make it any less a corporation of Missouri, by which state it was first incorporated? The fact that the defendant holds and exercises chartered powers by the common legislation of two states, and exercises a common citizenship of those states, does not destroy its rights as a citizen of Missouri, for it does not take away the fact of its citizenship in such state."<sup>3</sup> The authorities hold that "railroad companies created by two or more states, though joined in their interests, in the operations of their roads, in the issue of their stock, and in the division of their profits, so as practically to be a single corporation, do not lose their identity, and that each one has its existence and its standing in the courts of the country only by virtue of the legislation of the state by which it is created."<sup>4</sup> The effect of the legislation of Arkansas "can not be so construed as to take away the right of the defendant, created by law a citizen of Missouri, from going into the federal court, or hindering a citizen from bringing a suit against it in such courts, as to do so would be an exercise of power by the legislature of the state, which, under the constitution of the United States, belongs alone to congress—that of defining the jurisdiction of the federal courts."<sup>5</sup> Motion to remand overruled.

<sup>1</sup> *Stephens v. St. Louis & San Francisco Ry. Co.*, 47 Fed. Rep. 530.

<sup>2</sup> *James v. Same Defendant*, *supra*.

<sup>3</sup> Citing *Horne v. Railroad Co.*, 62 N. H. 454, and same parties in 18 Fed. Rep. 50; *R. R. v. Whitton*, 18 Wall. 270.

<sup>4</sup> Citations: *Nashua, etc., v. Boston, etc.*, 136 U. S. 356; 10 S. C. R. 1004; *Chicago, etc., v. Lake Shore, etc.*, 5 Fed. Rep. 19; *Uphoff v. Railway Co.*, Id. 545.

<sup>5</sup> Without question the conclusion reached is correct; there are really



## SECTION THIRTY.

## A few suggestions by the author.

Would it not tend to more consistent results if the true distinction between the corporate entities were constantly borne in mind? Thus, one set of men incorporate in Iowa and there build a road; said *corporation* then obtains permission to extend its line through Kansas; clearly, this is the same corporation, domestic in Iowa, foreign in Kansas, operating in the latter state simply by sufferance. But suppose that not the *corporation*, but the *members* thereof obtain, not permission, but incorporation, in Kansas; this creates a second and distinct corporation, domestic in Kansas, albeit with the same members, who content themselves with holding but one certificate of stock representative of the values of the roads in both the states, instead of estimating each road, and stocking it, separately. And again, if, instead of the members of the Iowa corporation applying for incorporation in Kansas, the Iowa corporation itself should there apply, and would there receive incorporation, it would, though by a shorter process, as clearly constitute a second and distinct corporation as in the other illustration. The proof and test of these conclusions is simple enough; suppose in Iowa the duration of a corporation is allowed to be for less years than it is in Kansas; then at the expiration of the shorter period the Iowa corporation would be at an end; but not so with its colleague in Kansas, which would continue undisturbed to the end of its period.<sup>1</sup>

two corporations, one of Missouri, to be the defendant, there would be the other of Arkansas; the plaintiff no right of removal. is a citizen of Arkansas, the injury<sup>1</sup> A good illustration of this is found *was done in Missouri*, evidently in *Montgomery & West Point R. R. Co. v. Boring*, 51 Ga. 582; see this therefore by the Missouri corporation, book, chapter XIII, section 4, in which an Alabama corporation, incorporated also in Georgia, when sued in Georgia pleaded that it had no existence, having surrendered its charter to the State of Alabama; plea held bad, as it still had an existence in and that body being then presumed Georgia.

On the theory, however (necessarily implied though not expressed), that the corporate entity is the same; it has been held<sup>1</sup> that a Wisconsin corporation, when sued in Iowa, must, in its petition for removal, not only allege that it is not a citizen of Iowa, but also that it is not a resident of Iowa. An eight-line opinion by the late Justice Miller is to the effect that the corporation may be a resident of Iowa by reason of doing business there.

This decision, although by so eminent a jurist, does not seem on its merits to be in accord with the authorities, which hold, as a rule, that a corporation is *conclusively* presumed to be a citizen of the state in which incorporated; to be capable of having but one residence, which must needs be in the state of its citizenship; and that it can not, either by its own will, or by engaging elsewhere in business, change its residence or acquire another.<sup>2</sup>

In the form of the petition for removal, however, there was a defect; because *non constat* the defendant may have been incorporated in Iowa as well as in Wisconsin, in which case it would be a citizen and resident of Iowa. This possibility of there having been an Iowa act incorporating the defendant, should have been negatived in the petition for removal.<sup>3</sup>

The allegations in the Overman case,<sup>4</sup> referred to elsewhere, were that the defendant was and is, etc., "a corporation, existing under and by virtue of the laws of the State of Maine, located at Portland in said state, and is a citizen of said state."

Opinion by Shipman, J., to the effect that the petition for removal is defective; it should also state that the defendant is a non-resident of the State of Connecticut. The court holds, however, that if the defect is in the substance there could be no amendment,<sup>5</sup> but where there is only a lack of proper state-

<sup>1</sup> *Hirschl v. J. I. Case Threshing M. Co.*, 42 Fed. Rep. 803. The author of this work desires to bestow credit where it belongs, and states that to his attorney in that case, W. J. Roberts, Esq., of Keokuk, Iowa, is due the success of remanding the cause.

<sup>2</sup> *Overman Wheel Co. v. Pope Manufacturing Co.*, 46 Fed. Rep. 577, and cases therein cited.

<sup>3</sup> See *Overman Wheel Co. v. Pope Manufacturing Co.*, 46 Fed. Rep. 577, in which the court holds in abeyance the motion to remand, until defendant can in this respect amend its petition in the state court.

<sup>4</sup> *Overman Wheel Co. et al. v. Pope Manfg. Co.*, 46 Fed. Rep. 577.

<sup>5</sup> *Crehore v. Railroad Co.*, 131 U. S. 240; 9 S. C. R. 692.

ment it may be amended.' If the cause is remanded it can not be again removed,<sup>1</sup> hence the conclusion is that the motion to remand is held in abeyance until the petition can be amended in the state court.

As to the allegations themselves, the court is of the opinion that to say of a corporation that it is incorporated in a state is tantamount to alleging not only that it is a citizen of that state, but also a resident thereof; nevertheless it might also be a citizen and resident of another state by virtue of an incorporation therein,<sup>2</sup> and hence the existence of such possibility should be negatived.

In *Myers v. Murray*, 43 Fed. Rep. 695, the entire discussion is upon the point that the corporation is presumed to be a citizen and resident of the state of its organization, and that it does not acquire a residence in another state by doing business there; the question as to whether the removal petition should negative the existence of another residence because of the possibility of another incorporation is not at all alluded to.

### SECTION THIRTY-ONE.

**Cohn v. Louisville N. O. & T. R. Co., 39 Fed. 227.**

**Consolidation held domestic as to liabilities there incurred.**

A consolidated corporation sued in Mississippi in a state court can not remove the same to the federal court, the defendant

<sup>1</sup> *Ayres v. Watson*, 113 U. S. 594; 1094; *Goodlett v. R. R. Co.*, 122 U. S. 5 S. C. R. 641. 391; 7 S. C. R. 1254; *Ins. Co. v. Wood-*

<sup>2</sup> *Johnston v. Donovan*, 30 Fed. Rep. 895; *Freeman v. Butler*, 39 Fed. Rep. 1. 364; *R. R. Co. v. Harris*, 12 Wall. 65; *Riddle v. R. R. Co.*, 39 Fed. Rep. 290;

<sup>3</sup> *Railroad Co. v. Alabama*, 107 U. S. 581; 2 S. C. R. 482. Other authorities reviewed on the several points: *Hirschl v. Case*, 42 Fed. Rep. 803; *Myers v. Murray*, 43 Fed. Rep. 695; *Cooley v. McArthur*, 35 Fed. Rep. 872; *Parker v. Overman*, 18 How. 137; *Insurance Co. v. Francis*, 11 Wall. 216; *Ex parte Schollenberger*, 96 U. S. 377; *Railroad Co. v. Koontz*, 104 U. S. 11; *Pa., etc., Co. v. St. L., etc., Co.*, 113 U. S. 290; 6 S. C. R. Consolidated, etc., v. *Lamson*, 41 Fed. Rep. 833; *Steamship Co. v. Tugman*, 106 U. S. 118; 1 S. C. R. 58. In *Louisville & N. R. Co. v. Paul* (Miss.), 16 Southern Reporter 753, it is held that an Alabama corporation doing business in Mississippi, and there sued for acts done in Alabama, may be deemed a resident also of Mississippi, and hence can not avail itself of the short period of limitations prescribed in Alabama.

being composed of three corporations, one organized in that state and the others elsewhere, and the Mississippi act authorizing the consolidation declaring that the same shall be deemed to be a citizen of that state.

Opinion by Hill, J., saying, *inter alia*: "The petition for removal avers that the defendant is a corporation created by the laws of Tennessee, and has its principal office and place of business in that state. While this is true in the state of Tennessee, it is true from the admitted facts as well as the act of consolidation of this state, that it is equally a corporation created under the laws of this state, and must be treated as such, so far as it relates to its contracts and liabilities incurred in this state."

### SECTION THIRTY-TWO.

**Colglazier v. Louisville, New Albany & Chicago Railway Co., 23 Federal Reporter 568.**

#### **Citizenship in two states recognized.**

Suit in state court in Indiana by a citizen thereof for personal injuries sustained in Indiana; defendant, on showing itself to be a corporation created by the laws of Kentucky and a citizen of Kentucky, caused a removal of the case to the federal court; plaintiff there made allegation and proof that the defendant was a corporation duly organized under the laws of Indiana, and was then and still is a citizen of both the States of Kentucky and Indiana by reason of its organization in said states respectively.

Cause remanded.<sup>1</sup>

<sup>1</sup>The ruling by Woods, J., cites *Krohn*, 66 Fed. Rep. 655 (Circuit Chicago & W. O. R. Co. v. Lake Shore Co., 10 Biss. 122; S. C., 5 Fed. Rep. 19; *Copeland v. Memphis, etc., Co.*, 8 Woods 651; *Uphoff v. Chicago, etc., Co.*, 5 Fed. Rep. 545; *Nashua, etc., Co. v. Boston, etc., Co.*, 8 Fed. Rep. 458; *Johnson v. Philadelphia, etc., Co.*, 9 Fed. Rep. 6; *Horne v. Boston & M. R. Co.*, 18 Fed. Rep. 50; *St. Louis, etc., v. I. & St. L. R. Co.*, 9 Biss. 144; *Muller v. Dows*, 94 U. S. 444.

The recent case of *Williamson v.*

Court of Appeals—Lurton, Severens and Swan) holds that a citizen of Ohio may, in the Federal Court in Kentucky, sue a consolidation formed of corporations of Ohio and Kentucky, but Taft, J., in *Krohn v. Williamson*, 62 Fed. Rep. 869, 877, places the jurisdiction upon the fact that the Kentucky corporation is the defendant, saying that if the consolidation were defendant, there would be no jurisdiction.

## SECTION THIRTY-THREE.

**McGregor, qui tam, v. Erie Railway Co., 35 N. J. 115.**

**Foreign corporation may be treated as domestic.**

The Erie Railroad company, although it is a New York corporation, becomes a New Jersey corporation to the full extent of the powers and franchises confirmed and invested in it in New Jersey by virtue of the various legislative acts under which its title to roads there acquired by foreclosure was confirmed and its own organization there completed; and hence it becomes liable to their penalties for charging excessive freight rates. A corporation may have "a corporate entity in each state, yet in the general character be of a bi-fold organization."<sup>1</sup>

## SECTION THIRTY-FOUR.

**A. & W. Sprague v. The Hartford, Providence & Fishkill Railroad Company, 5 Rhode Island 233.**

**Suit in state court by foreign attachment; attachment held void.**

The defendant originally consisted of two corporations, organized in Connecticut and Rhode Island, respectively; "these were afterward united by acts of said two states and became one corporation, having one set of stockholders and officers and one capital. Such defendant is not subject to attachment in Rhode Island as a foreign corporation; it is only a foreign corporation, that is, one exclusively owing its corporate existence to the legislation or sovereign act of another state or country, which can be proceeded against, in the first instance, for debt, by attachment of its property, under Ch. 182, § 1, of the Revised Statutes."

<sup>1</sup>Sprague v. Hartford R. R. Co., 5 R. Co. v. Wheeler, 1 Black 286; State R. I. 233; Maryland v. Northern R. v. Meetz, 3 Vroom 199. R. Co., 18 Maryland 194; O. & M. R.

## SECTION THIRTY-FIVE.

**The State of Maryland v. The Northern Central Railway Company, 18 Maryland 193.**

**Foreclosure of road lying in different states.**

Bill in the state court to foreclose mortgage upon a line of railroad lying in Maryland and in Pennsylvania and belonging to the defendant, a corporation incorporated in each of these two states; plea that court has no jurisdiction, overruled.

The plea that court has no jurisdiction is not tenable either on the ground that the property lies in part in another state or that corporate existence is derived in part from a charter of another state; such corporation exercising its franchises here is subject to our jurisdiction,<sup>1</sup> and "may be restrained here from expending their funds for any other than corporate purposes anywhere;" hence this body politic must, for the purposes of justice, "be treated as a separate corporation by the courts of justice of each government from which it derives its being, that is, as a domestic legal entity to the extent of the government under which it acts, and as a foreign corporation as regards the other sources of its existence."

## SECTION THIRTY-SIX.

**Lizzie Copeland, Administratrix, v. The Memphis & Charleston Railroad Company, 3 Woods, 651.**

**Citizenship of a foreign corporation re-incorporated.**

Suit in state court in Alabama by a citizen thereof; cause removed to federal court; remanded.

Defendant was incorporated in Tennessee, and claimed to remove because it was a citizen of Tennessee.

The statement of the case does not show where the injury occurred.

The court reviews the acts of the legislature of Alabama and holds that they were not merely for the purpose of allowing

<sup>1</sup> 2 Bland, 96, 147, 148; 1 Code, page 540, Secs. 99, 101, 102.

the Tennessee corporation to operate in Alabama, but were in fact and in law a re-incorporation in Alabama; one of the significant phrases used in the act is, "the company hereby incorporated;" the title also declares its purpose "to incorporate" the company.

"But it is claimed by counsel for the railroad company that even admitting that the act of January 7, 1850, was a charter, yet it was a charter conferred on a corporation of the State of Tennessee, without creating a new corporate body. It is true that two states may unite in creating one and the same corporate body, and it was so held in *Railroad Co. v. Harris*.<sup>1</sup> But when two states unite to create the same body corporate, it is a citizen of each of the states by whose legislature it is created."<sup>2</sup>

#### SECTION THIRTY-SEVEN.

*Goodlett v. L. & N. R. Co.*, 122 U. S. 391; 7 S. C. R. 1254.

#### **Distinction between permission to operate and grant of corporate existence.**

Louisville & Nashville Railroad Company, defendant, was incorporated in Kentucky, to build a road to the state line, between Kentucky and Tennessee. Thereafter the legislature of Tennessee passed an act, entitled "An act to incorporate the Louisville & Nashville Railroad Company." Giving to the defendant the right of way to construct its line, and all necessary powers, the act contained other provisions and directions, among which was one entitling the stockholders residing in Tennessee to be represented in the directory.

The entire act is examined, and although the word *incorporate* is used in the title, yet the court holds that its intent was not to create a new company, but simply to give license to the existing company to extend its line through Tennessee. Hence it is not a Tennessee corporation, and having been there sued, it properly removed the cause to the federal court.

<sup>1</sup> 12 Wall. 65.

*O. & M. R. R. Co. v. Wheeler*, 1

<sup>2</sup> *R. R. Co. v. Whitton*, 13 Wall. 270; Black 286.



## SECTION THIRTY-EIGHT.

**Missouri, K. & T. Ry. Co. v. Texas & St. L. Ry. Co., 10 Fed. 497.**

Same topic.

Bill in federal court in Texas for injunction to restrain defendant from making a crossing over complainant's track. The court sustains the jurisdiction; McCormick, D. J.

Complainant was incorporated in Kansas; and on August 2, 1870, the legislature of Texas passed an act giving it the right to build through Texas, and that, for such purpose, it should have and exercise all the rights, powers, privileges and immunities granted by its acts of incorporation, so far as the same may be applicable to this state (Texas), together "with all the rights, powers, privileges and immunities conferred by all general laws now existing or that hereafter may be passed by the legislature of the State of Texas in relation to railroad corporations, in same manner and to same extent as if incorporated by this state, provided the said company shall keep an office within this state." Originally the courts hesitated about entertaining jurisdiction of corporations, not deeming them to be citizens, but then it was considered that they are composed of, and representative of, real, natural persons, who have rights to be protected and enforced, and from this grew the doctrine of considering them to be citizens of the states which created them, by presuming such natural persons to be citizens thereof.<sup>1</sup> So far as developed by the adjudged cases,<sup>2</sup> the rule is, that where the act of a state provides for the incorporation and organization of a company it becomes a citizen of such state, although the same persons, by the same corporate name, have been incorporated with the same powers and for the same object by another state; but when the act does not create the corporation, but recognizes it as already existing by the laws of another state, and extends to it like powers as it has from the other state, then such act is construed only as a license enlarging the company's field of operations; and when the company operates in such other state it does not become a

<sup>1</sup> 5 Cranch 87; 2 How. 558; 16 How. 825; 20 How. 282.

<sup>2</sup> 1 Black 297, 298; 18 Wall. 284; R. v. Harris, 12 Wall. 65.

corporation of that state, but goes there as a corporation of another state; it is liable to be sued in such new state, but is shorn of none of its qualities as a corporation of another state. Complainant, though operating in Texas under the privileges of the statutes thereof above referred to, remained a citizen of Kansas, and as such, privileged to elect to sue in the federal court in Texas.

### SECTION THIRTY-NINE.

**Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.**, 118 U. S. 290; 6 S. C. R. 1094. Petition for rehearing overruled, 118 U. S. 630; 7 S. C. R. 24.

#### Same topic.

Bill in the federal court by the St. Louis, Alton & Terre Haute Railroad Company against the Indianapolis & St. Louis Railroad Company, to recover rent. The complainant was incorporated under the laws of Illinois and owned a road there, and also a few miles of road in Indiana, which latter portion it leased to the defendant; the owning or operating of this portion in Indiana, or even of a road through Indiana, would not make the complainant a citizen of Indiana, nor would it become such by an act of the legislature of Indiana, conferring on this Illinois corporation, by its Illinois corporate name, such powers to enable it to use and control that part of its road in Indiana, as have been conferred upon it by the state which created it. To make an existing company a corporation of another state, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state or by the legislature, and such allegiance as a state corporation owes to its creator, and it does not become such new corporation of another state, until it does some act which signifies its acceptance of this legislation and its purpose to be governed by it. The mere grant of privileges or powers to an existing corporation, without more, does not make it a citizen of the state conferring such powers. The facts of this case do not show such new incorporation. The Terre Haute & Alton Railroad Company was incorporated in Illinois by special act of January 28, 1851, and by an act of February 11, 1851, of the legislature of Indiana, was permitted

to extend its road a few miles into Indiana. The property of said company was sold under foreclosure, the purchasers organized under an Illinois act as the St. Louis, Alton & Terre Haute Railroad Company (the complainant), and "by the Illinois statute succeeded to all the franchises of the original Terre Haute, Alton & St. Louis Company. As these included all the powers necessary to operate the few miles of the road in Indiana, under the act of February 11, 1851, it was unnecessary to seek an act of incorporation from that state." The said purchasers did, however, file with the secretary of state of Indiana, a certificate of the organization of the new company, with the names of the first directors; and it is argued that this makes it an Indiana corporation. A critical examination thereof renders it very doubtful whether that was its purpose, but rather indicates that it was intended to secure and perpetuate the rights granted to the Terre Haute & Alton Company, by the act of February 11, 1851. At all events, no evidence exists of the agreement of the new Illinois company to accept of or act under this attempt at organization under the Indiana laws. They never held an election for directors of the Indiana corporation, if one existed, and they never in any other manner recognized the existence of an Indiana corporation of the same name, and hence never became an Indiana corporation. Neither is the defendant, the Indianapolis & St. Louis Company, an Illinois corporation.<sup>1</sup> Hence, complainant properly brought its bill in the federal court.

#### SECTION FORTY.

**Railroad Co. v. Harris, 12 Wall. 65.**

**Same topic.**

The Baltimore & Ohio Railroad Company was incorporated in Maryland, February 28, 1827. On March 8, 1827, the legislature of Virginia passed an act, reciting the Maryland act, giving the company the same rights and privileges in Virginia that it had received in Maryland, and subjecting it

<sup>1</sup> For the same reasons given in *Railway Co. v. Whitton*, 18 Wall. 270; *Muller v. Dows*, 94 U. S. 444.

to the same penalties and obligations and reserving to the state and its citizens the same rights, privileges and immunities which had been reserved to Maryland. Thereafter Congress gave the corporation similar privileges in the District of Columbia. It is held that this did not create a new corporation in the district nor in Virginia, but was only the grant of a license to the existing Maryland corporation to there extend its line. It is conclusively presumed to be a citizen of the state where it was created.<sup>1</sup> It can not migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these may be that it shall consent to be sued there. If it do business there it will be presumed to have assented, and will be bound accordingly.<sup>2</sup> Hence defendant was properly sued in the District of Columbia; its pleas that it was not an inhabitant of the District when the writ was served, and that it was not found in the District, were properly overruled. It is well settled that corporations of one state may exercise their faculties in another, so far and on such terms and to such extent as may be permitted by the latter.<sup>3</sup> This case comes under this view.<sup>4</sup>

#### SECTION FORTY-ONE.

**Morgan v. East Tenn. & V. R. Co., 48 Fed. 705.**

**Conferring on the buyer the seller's privileges, does not make a domestic corporation.**

The purchase by a Tennessee corporation of a railroad in Georgia, sold in accordance with the statute, which confers on the purchaser "all the rights and privileges" of the seller,

<sup>1</sup> Louisville, C. & C. R. R. Co. v. Letson, 2 How. 497; Marshall v. The B. & O. R. R. Co., 16 Id. 829; O. & M. R. R. Co. v. Wheeler, 1 Black 297.      <sup>2</sup> Blackstone Mfg. Co. v. Inhabitants, 18 Gray, 489; Bank of Augusta v. Earle, 13 Peters 588.

<sup>4</sup> The case is an instructive one in its reasoning and citations.

<sup>3</sup> Lafayette Ins. Co. v. French, 18 How. 405.

does not make the purchaser a Georgia corporation, and hence does not prevent it, when sued in Georgia, from removing the cause to the federal court.<sup>1</sup>

## SECTION FORTY-TWO.

### Sundry instances.

A Connecticut corporation operating in West Virginia does not there become a domestic road, although the statute says that all foreign roads there operating for a certain time after its enactment shall be declared to be domestic; the state can not thus deprive the defendant of its right to resort to the federal courts. *Rece v. Newport News & M. V. Co.*, 32 W. Va. 164, 9 S. E. 212.

Nor does a Wisconsin corporation become a domestic one in Minnesota under a similar statute; the whole act is construed as an unlawful attempt to oust the federal courts of their jurisdiction. The statute says all foreign corporations remaining in the state for sixty days after its enactment shall be deemed to be domestic. The hardship is alluded to which they would experience if attempting to remove from the state. *Chicago, W. & St. P. Ry. Co. v. Becker*, 32 Fed. 849.

Territorial corporations do not become "federal" corporations by receiving permission from congress to extend lines through the Indian Territory. *Conlon v. Oregon S. L. & U. N. Co.*, 28 Pac. 501.

Filing copy of articles with secretary of state under Iowa statute of XVIIIth General Assembly, and thus obtaining power to extend lines into Iowa and to exercise all the franchises of an Iowa corporation does not make the company an Iowa corporation. *Chicago, I. & N. R. R. Co. v. Minn. & N. W. R. Co.*, 29 Fed. 337.

The Baltimore & Ohio R. Co. has merely a license to oper-

<sup>1</sup> Citing *Railroad Co. v. Harris*, 12 Wall. 65; *Callahan v. Railroad Co.*, 11 Federal 586; *Railroad Co. v. Koontz*, 104 U. S. 5; *Railroad Co. v. Cary*, 28 Ohio St. 208; all of which are said to be cases in which the foreign corporation merely obtains permission to operate in the state without receiving any new corporate grant or capacity therein.

ate in West Virginia; it is a Maryland corporation. *County Court v. Baltimore & Ohio R. Co.*, 35 Federal 161.

When the road lies in three states, the receivership is an independent proceeding in each. It is not a principal proceeding in either. Parties can have relief in either proceeding. *In re U. S. Rolling Stock Co.*, 55 How. Pr. 286.

Bill for accounting and dividends against road in two states. Jurisdiction lies in either; to deny this is said to lead to the absurd conclusion that it is in *neither*. *Richardson v. Vermont, etc., R. R. Co.*, 44 Vt. 613.

A national bank is a domestic corporation in the place in which it is located. *Hummel v. First N. Bk. (Col.)* 32 Pacific R. 72.

## CHAPTER X.

## RIGHTS OF CREDITORS RECOGNIZED.

For the purpose of protecting creditors, an old corporation is presumed to be continued in a new one chartered to succeed it, and its property and liabilities attach to the new one, unless there is express provision to the contrary.

The inquiry generally resolves itself into the construction of the particular statutes involved, requiring the new corporation to assume the liabilities of the old.

Though a combination by reason of its illegality might be barred from recovering its demands, yet its receiver, as representing its innocent creditors, may for their protection so do; the creditors are not *in pari delicto* with the combination, although the stockholders or members thereof may be.

The succeeding company is at times held liable to the creditors of the predecessor upon the general equitable principle, applicable to creditors' bills, that it has received, without adequate consideration, assets of the predecessor which are equitably chargeable with the debts of the same.

The new company buying the assets of the old and paying for the same with the stock of the new company is, so far as creditors are concerned, substantially the old company under a new name, and takes such assets subject to the debts of the old company.

The remedy has been held to be at law directly against the new company where it had become the successor of the former or had expressly or by implication assumed its debts, or in equity against the assets transferred, and a judgment has not been deemed a pre-requisite in all such cases.

The protection of creditors extends even to holding personally liable the trustees or managers who manipulated the transfers.



## SECTION ONE.

**Broughton v. Pensacola, 93 U. S. 266.****To protect creditors, the former corporation is presumed continued.**

Bill in equity by complainant to recover from defendant city amount due on coupons. The city of Pensacola was re-chartered in 1839, by act of legislature of Territory of Florida; its powers were vested in a mayor and aldermen, who were at all times to continue "to act in their respective functions" until the election and qualification of their successors in office. They were empowered by sundry successive acts, passed prior to 1868, to borrow money and issue bonds to aid railroads, and to levy taxes for meeting them; bonds so issued are held by the plaintiff.

The constitution of 1868, and legislation held thereunder, establish a uniform system of municipal government, and provide for the reorganization of municipalities. The city accordingly surrendered its charter, but failing to otherwise comply with the law, it was not reorganized. Its citizens, deeming themselves to be without any municipal incorporation, then organized under the law of 1869, which provided for such cases.

Plaintiff made demand on said last organization for payment of his coupons; same was refused on the ground that it was a new and distinct organization from the one which issued the bonds, and not liable for the same; plaintiff brings his bill in equity to enforce payment.

Following is opinion of the court in full:

"By an act passed on the 2d of March, 1839, by the then Territory, now State, of Florida, the city of Pensacola, at the time a pre-existing corporation, was re-chartered, and its powers were vested in a mayor and board of aldermen, who were, at all times, to continue "to act in their respective functions until the election and qualification of their successors in office. Among the powers conferred by the charter was the power to borrow money, not exceeding \$5,000 a year, and to levy taxes and provide for their collection, with a limitation of the amount to be levied upon real estate to three-fourths of one per cent.

In December, 1850, by an amendatory act, these limitations were repealed, and a larger loan, and a greater rate of taxation upon real estate were allowed. By a further amendatory act, passed on the 3d of January, 1853, the mayor and aldermen, with the consent of a majority of the corporation, were authorized to subscribe, in the name of the city, any amount of money which they might deem necessary to any railroad leading from the city, and for the purpose of procuring the amount of the subscription, were empowered to borrow the same, and impose a tax upon real estate within its limits, not exceeding two per cent on the assessed value of the property. By another act, passed in the same month, the Alabama and Florida Railroad Company was chartered to construct a railroad from some point on Pensacola Bay (the city being the point afterward selected) northward to the boundary line of Florida and Alabama, and there to connect with another line of road to be constructed from the city of Montgomery, Alabama.

Under the act of January 3, 1853, the city of Pensacola subscribed \$250,000 to the capital stock of this railroad company, and in payment of the same executed and delivered to the company five hundred bonds of \$500 each, payable twenty years after date, with interest at the rate of seven per cent per annum, payable semi-annually on the first days of January and July, at such bank in the city of New York as the treasurer might direct, on the surrender of the coupons for such interest attached to the bonds.

The plaintiff is the holder of sixteen hundred and ninety of these coupons, now past due, and alleges that the city has never made any provision for their payment at any bank in the city of New York, or at any other place; that, until about the 1st of January, 1871, the city received the coupons in payment of taxes, although the taxes assessed were never sufficient to absorb the coupons as they matured, but that since that time the city has refused, and still refuses, to recognize its obligation to pay them. Several judgments have been recovered by other parties upon coupons of the same kind against the city; but executions issued thereon have been returned wholly unsatisfied, because the city possessed no property out of which they could be made.

The constitution of Florida, adopted in 1868, provided that

the legislature should "establish a uniform system of county, township, and municipal government." In pursuance of this requirement, the legislature in 1868 and 1869 passed acts "to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government" in the state. These acts authorized the establishment of a municipal government, with corporate powers and privileges, by the voluntary action of the male inhabitants of any hamlet, village, or town in the state, not less than one hundred in number; and also provided for the reorganization of existing municipal corporations under their provisions. Under these acts the charter of the city was surrendered, and attempts were made to reorganize its government; but these attempts failed, because the reorganization was not made within the periods prescribed. In consequence of such failure, and because the acts provided for the cessation of corporate authority in case the reorganization was not effected within the periods designated, the citizens residing within the limits of the city proceeded to establish a municipal government with corporate authority, under the act of 1869, as citizens not having any existing corporation were authorized to do. Such establishment or reorganization of government having been effected, the plaintiff applied to its officers for the payment of the coupons held by him; but the payment was refused, they insisting that they were officers of a new and distinct corporation from the one which issued the bonds and coupons mentioned, and that the present corporation was not responsible for them. The plaintiff thereupon filed the present bill, asking for a decree for the amount of the coupons held by him against the city of Pensacola; that the city be compelled to levy a tax upon real and personal property within its limits sufficient to satisfy such decree and costs, and for general relief. Upon demurrer, the bill was dismissed; and on appeal, the case is brought here for our consideration.

The ancient doctrine that upon the repeal of a private corporation its debts were extinguished, and its real property reverted to its grantors, and its personal property vested in the state, has been so far modified by modern adjudications, that a court of equity will now lay hold of the property of a dissolved corporation, and administer it for the benefit of its creditors and stockholders. The obligation of contracts, made

whilst the corporation was in existence, survives its dissolution; and the contract may be enforced by a court of equity, so far as to subject, for their satisfaction, any property possessed by the corporation at the time. In the view of equity, its property constitutes a trust fund pledged to the payment of the debts of creditors and stockholders; and if a municipal corporation, upon the surrender, or extinction in other ways, of its charter, is possessed of any property, a court of equity will equally take possession of it for the benefit of the creditors of the corporation. In this case it is averred in the bill that the city of Pensacola, upon the surrender of its original charter, did not possess any property.

It is not necessary, however, in the view we take of the proceedings for the reorganization of the city government, to consider the effect of an absolute repeal of the charter of a municipal corporation upon its obligations. It is sufficient that here, in our judgment, there was a continuation of the corporation of Pensacola, with its original rights of property and obligations; not a new and distinct creation of corporate capacity and liability.

The constitution of 1868 only designed to secure uniformity in county, township and municipal government. It contemplated no change in existing liabilities. The acts of 1868 and 1869, passed to carry into effect the constitutional provisions, aimed solely to secure this uniformity. They do not even allude to previous liabilities. Although a municipal corporation, so far as it is invested with subordinate legislative powers for local purposes, is a mere instrumentality of the state for the convenient administration of government, yet, when authorized to take stock in a railroad company, and issue its obligations in payment of the stock, it is to that extent to be deemed a private corporation, and its obligations are secured by all the guaranties which protect the engagements of private individuals. The inhibition of the constitution, which preserves against the interference of a state the sacredness of contracts, applies to the liabilities of municipal corporations created by its permission; and although the repeal or modification of the charter of a corporation of that kind is not within the inhibition, yet it will not be admitted, where its legislation is susceptible of another construction, that the state has in this way sanctioned an evasion of, or escape from liabilities,

the creation of which is authorized. When, therefore, a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs; and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization. That such was the intention of the State of Florida in the present case, we have no doubt; to suppose otherwise would be to impute to her an insensibility to the claims of morality and justice, which nothing in her history warrants.

The principle which applies to the state would seem to be applicable to cases of this kind. Obligations contracted by its agents continue against the state, whatever changes may take place in its constitution of government. "The new government," says Wheaton, "succeeds to the fiscal rights, and is bound to fulfill the fiscal obligations of the former government. It becomes entitled to the public domain and other property of the state, and is bound to pay its debts previously contracted." *Inter. Law*, 30. So, a change in the charter of a municipal corporation, in whole or in part, by an amendment of its provisions, or the substitution of a new charter in place of the old one, should not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities.

In a case recently decided by the Circuit Court of the United States for the Northern District of Florida, *Milner's Administrator v. City of Pensacola*, 2 Woods, 632, the effect of the legislation of the state upon the corporate existence of the city of Pensacola was examined. The court held and sustained its conclusion in an able and well considered opinion, that the reorganization of the city, under the act of 1869, was simply the assumption by the city of the new powers and privileges which the act conferred, and was not the creation of a new corporation—a conclusion which accords with our judgment.

It follows, from the views we have expressed, that the remedy of the plaintiff was not by a suit in equity, but by an action at law against the present corporation upon the coupons; and if judgment be recovered thereon and not be paid, then by mandamus upon its officers to compel them to raise the requisite funds for its payment in the manner prescribed by its charter.

*Decree affirmed, without prejudice to the plaintiff's right to proceed at law.*

## SECTION TWO.

**Polhemus v. Fitchburg R. Co.**, 8 N. Y. Supp. 827; affirmed, 123 N. Y. 502; 26 N. E. 31. (Three judges dissent.)

### **The New York statute construed.**

Where the rights of the creditors are protected by the statute, the chief inquiry is necessarily upon its construction. The New York statute of 1869, Ch. 917, provides that the new corporation shall, as fully as though incurred by itself, become liable for all "debts and liabilities," *except mortgages*, of the constituent companies.

Plaintiff is the holder of bonds and coupons made by, and secured by mortgage of, one of the constituent companies; it is decided that the bonds are the debt, and hence the new corporation is liable thereon, and it is also said, though evidently only a dictum, that the mortgage would not be extended to the new corporation property, but would be limited to what it originally covered.

This case is affirmed in a strong and well reasoned opinion by the appellate court, showing the fallacy of defendant's contending that "mortgages," meant the same as "mortgage debts;" for if this were so, it would follow that the unsecured creditor of a constituent company would really occupy a better position than the secured one; as the former could hold both companies, and the latter could look only to his mortgage and to the constituent company, which, however, would be practically out of existence. Nevertheless three judges (out of a total of seven) dissent, giving, however, no opinion, interesting as it would be to learn what possible opinion they could give on so plain a case.

Defendant contended that as the new corporation's property would in no event be covered by the old mortgages, the words "except mortgages" need not be in the statute for that purpose, and must be in for some purpose, hence, to stand, as they contend, as a release of "mortgage debts." The court, however, answers by admitting that the words may be surplusage (a not uncommon legislative occurrence) and says further that they may be there from an abundance of caution to make certain that all liens and incumbrances will remain as before the consolidation, neither impaired nor extended.

Which view is strengthened when reading the statute itself. "Sec. 5. The rights of all creditors of, *and all liens upon*, the property of either of said corporations shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of said corporations, *except mortgages*, shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if said debts or liabilities had been incurred or contracted by it."

### SECTION THREE.

**Mobile & M. Ry. Co. v. Gilmer, 85 Ala. 422; 5 Southern 188.**

#### **Meaning of "Creditor" in statute explained.**

Plaintiff had a contract with a railroad whereby they agreed to establish a flag station on his land; thereafter the company consolidated with another and thus formed the defendant company, under statutes providing that such consolidation "shall in no way affect the right of the creditors of such companies, and their separate existence shall be continued as to all the rights and remedies of creditors." Breach of plaintiff's contract occurred after the consolidation; held, nevertheless, that he is a creditor, and is so as of the date of his contract, and not merely as of the date of its breach, just as the covenantee in a warranty deed is deemed a creditor as from the date of the deed, and not only from the date of eviction.

The covenants in plaintiff's favor were also held to run with the land, and the defendant having taken the land with notice thereof, is bound to respond to plaintiff in damages for their breach.



## SECTION FOUR.

**Pittsburgh Carbon Co. v. McMillen, 6 N. Y. Supp 433.**

**Rights of creditors of a "Trust" are superior to the rights of the members.**

The Pittsburgh Carbon Co., under contract to furnish carbons to the Brush Electric Light Company, formed a combination with eight other companies, by which the business of the whole nine was to be exclusively managed and directed by one person. While such combination lasted, the Pittsburgh Carbon Co. furnished \$1,080 worth of carbon to the Brush Electric Light Company, and then notified said company that it would no longer continue its relations with said other companies, and that the amount of the above bill should be paid directly to it and not to the manager of the combination. Thereafter a receiver was appointed for the combination, who also demanded the above amount from the Brush Co., which company paid the money into court.

As against the receiver's demand, the Pittsburgh company pleaded the illegality of the combination, and hence asserted that the receiver could enforce no claim due to the combination, and that therefore the amount of the bill was payable to itself as having furnished the goods.

The court holds against this contention, saying that the combination had made debts, which have to be paid; the receiver represents these creditors, as well as the stockholders; he is empowered to recover the assets of the combination wherever found. The combination was itself a copartnership composed of the nine companies, and though unlawful, yet the court has power to take charge of its effects for the protection of innocent creditors. Plaintiff can not take advantage of its wrong and refuse to pay a debt for which it would have been liable had such combination been lawful; any creditor could have recovered judgment against plaintiff for any debt owing him by the combination. The creditors of the trust are not *in pari delicto* with the companies which form it. As such creditor could recover his demand, it follows that the receiver can do it for him, he being charged with the duty of distributing the assets among the lawful creditors of the concern.

## SECTION FIVE.

**Gale v. Troy & B. R. Co., 2 N. Y. Supp. 354.**

**Debt remains against original company.**

Bonds issued by a railroad company remain obligatory against the same after its consolidation with another company, and judgment may be obtained thereon against such original company, which by force of statute remains in existence for such purpose. "The rights of all creditors of, and all liens upon, the property of either of said corporations, parties to said agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same."<sup>1</sup>

## SECTION SIX.

**City of Indianola v. Gulf, Western Texas & Pacific Ry. Co.,  
56 Texas 594.**

**Consolidation liable at law for constituent's debts.**

In June, 1870, the Indianola Railroad Company executed its bond for \$50,000 to the city of Indianola; in August, 1870, said company was consolidated with the San Antonio & Mexican Gulf Railroad Company, under the name and style of the Gulf, Western Texas & Pacific Railway Company. Breach of bond occurred; the city brought suit on said bond in 1872, against the Gulf, Western Texas & Pacific Railway Company. The contest is entirely upon the question as to whether the city had power to go into the contract from which the bond resulted, also as to the measure of damages. The company had judgment below; reversed.

The court says that it may be assumed as settled law, that the consolidation by virtue of an act of the legislature, renders the consolidated company liable for all the valid contracts and liabilities of the two companies thus consolidated.<sup>2</sup>

<sup>1</sup> Laws of 1869, Ch. 917, § 5.

Brownlee (Ind.), 27 N. E. 580; by the

<sup>2</sup> Stephenson v. T. & P. R. R. Co., 42 Tex. 166; T. & P. R. W. Co. v. Murphy, 46 Tex. 360.

fact of a consolidation, the liabilities of the constituent companies become chargeable against the new com-

pany.  
See, also, dictum in Cashman v.

## SECTION SEVEN.

**Central & Montgomery R. Co. v. Morris, 68 Texas 49; 8 S. W. 457.**

**Original company liable for failing to carry goods; pleadings fail sufficiently to show sale of road.**

Plaintiff brought suit against the Central & Montgomery Railroad Company for refusing to transport his lumber, and also joined as defendant the Gulf, Colorado & Santa Fe Railway Company, alleging that it and its officers and agents "have or claim to have purchased and to own and operate and control the defendant, Central & Montgomery Railroad, and have taken charge of and are exercising ownership over all its property and effects, and undertaken to perform its functions and operate its franchises." Thereafter the suit was dismissed as to said Gulf, C. & S. F. R. R., and judgment obtained against the other. This judgment is sustained. The court fails to find any law which confers upon a railroad company the power even to lease its road.

Without legislative authority a railroad company can not transfer or lease the right to operate its road, so as to absolve itself from its duties to the public; nor will a lease duly authorized by law release the company from a failure to discharge its charter obligations, unless the law giving the power contain a proviso to this effect.<sup>1</sup> The constitutional provision<sup>2</sup> prohibiting parallel or competing roads from being consolidated is a restriction upon them, and is not to be construed as a grant of authority to non-competing roads to lease. A similar provision in a statute has been held not to authorize a lease.<sup>3</sup> There might, however, have been a sale under judicial process,<sup>4</sup> which would have been valid and would have transferred the property to the Gulf, C. & S. F. R. R., and thereafter the de-

<sup>1</sup> Citing *Abbott v. Horse Car Co.*, 80 N. Y. 27; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 623; *Nelson v. Vermont & C. R. Co.*, 26 Vt. 717; *Macon & A. R. Co. v. Mayes*, 49 Ga. 355; *R. R. v. Brown*, 17 Wall. 445; *Illinois Central R. Co. v. Barron*, 5 Wall. 90; 1 Rorer R. R. 605 *et seq.*; 1 Redf. Rys., c. 22, pp. 587, 616; *Pierce Rys.* 283, 496.

<sup>2</sup> Section 5, Article 10.

<sup>3</sup> *Abbott v. Johnston, etc., Horse Car Co.*, 80 N. Y. 27; S. C., 36 Am. R. 572; lessor road is liable for injury to passenger by lessee arising from latter's negligence.

<sup>4</sup> Revised Statute, art. 4260 *et seq.*

fendant, Central and Montgomery R. Co., would not have been liable. Such sale might have been indicated in the words "have or claimed to have purchased" above quoted. If it were the rule to give a construction most strongly against the pleader, and if these words stood alone, it would have to be so held. But in passing on general exceptions, every reasonable intendment arising on the pleading shall be indulged in favor of its sufficiency;<sup>1</sup> taking all the allegations together, and especially those averring the continued existence of the Central & Montgomery Co., as a common carrier, and it must be said that the pleader sought to exclude the idea that any such sale had taken place.

#### SECTION EIGHT.

**Louisville, N. A. & C. Ry. Co. v. Boney**, 117 Ind. 501; 20 N. E. 432.

**New corporation impliedly liable when old goes out of existence.**

The rule which the authorities support seems to be that where one corporation goes entirely out of existence by being incorporated into another, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the corporation into which it is merged will succeed to all its property and be answerable for all its liabilities. In this case the plaintiff had a statutory lien upon the road of the old company; said road was sold under a mortgage junior to plaintiff's lien; the purchasers organized as a corporation, which in turn was consolidated into the defendant company. Plaintiff is, therefore, entitled to his lien, but as the portion on which the lien rested proved insufficient, he was also held entitled to a judgment *in personam* against the defendant.

#### SECTION NINE.

**Mount Pleasant v. Beckwith**, 100 U. S. 514.

**Same topic; municipal corporation.**

A municipal corporation being legislated out of existence, its territory was annexed to other corporations; no other pro-

<sup>1</sup> Rule 17, 47 Texas 619.

vision being made, it is held that the latter became entitled to all the property and immunities of the extinct one, and also severally liable for a proportionate share of all its then subsisting legal debts, and vested with its powers to raise revenue wherewith to pay them by levying taxes upon the property transferred and the persons residing thereon. The remedy of the creditors is in equity.<sup>1</sup>

### SECTION TEN.

**Thompson, appellant, v. Abbott et al., Board of Education, 61 Mo. 176.**

**Same topic; school board.**

A township sub-district having become merged in an adjoining city, for school purposes, and the board of education of the municipality taken possession of the school property of the annexed district, the board is held thereby to assume an obligation for a teacher's salary previously incurred by the sub-district; and no direct promise or agreement is necessary.

The annexation is provided for by statute.<sup>2</sup> The city board succeeded to all its rights and was the only body having power to adjust and pay the sub-district's liabilities. Where one corporation goes entirely out of existence by being annexed to or merged in another corporation, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the subsisting corporation will be entitled to all the property and be answerable for all the liabilities. After the sub-district had ceased to exist, there was then no power remaining as an independent organization in its behalf, to control its funds or pay off its indebtedness. "Its property passed into the hands of the defendant, and when the benefits

<sup>1</sup>Opinion by Mr. Justice Clifford, quires legislation to make a legal citing *Morgan v. Beloit*, 7 Wall. 613, obligation against the new town." 617; *Town of Depere v. Town*, 81 *Barber v. City*, 18 S. W. 438 (Tex.) Wis. 120, 125; *Thompson v. Abbott*, holds succeeding city liable at law 61 Mo. 176, 177; *Swain v. Seamans*, for tort of predecessor; under statute 9 Wall. 254, 274; *Pickard v. Sears*, 6 providing for "debts." Ad. & Ell. 474, and numerous others <sup>2</sup>*Wagner's Statutes*, Ed. of 1872, p. germane to the general discussion. 1267, § 17. Three justices dissent, saying: "It re-

were taken the burdens were assumed." The demurrer to the declaration was improperly sustained; judgment reversed and cause remanded.<sup>1</sup>

### SECTION ELEVEN.

**Rosenkrans v. La Fayette, B. & M. R. Co. et al., 18 Federal 518.**

#### **Right to convert bonds into stock, preserved.**

Plaintiff is the holder of income bonds, issued by the La Fayette, Bloomington & Muncie Railway Company. The bonds recite, "This bond may, at the option of the holder, be converted into the capital stock of the said railway company at par, at any time before maturity." Thereafter the company was consolidated with another, and its original capital stock of \$1,000,000 was increased or "watered," as the bill terms it, so that \$4,000,000 in stock were issued in place of the original to the stockholders. The other road had also issued income bonds. The articles of consolidation provided that in case any of the bondholders availed themselves of the privilege of converting their bonds, that then additional stock of the consolidated company sufficient to make the exchange should be issued.

The plaintiff contends that inasmuch as he had the option to exchange his bonds for stock in the La Fayette, Bloomington & Muncie Railway Company, that he should be deemed to occupy as favorable a position as the stockholders thereof, and hence should receive four times as much in stock in the consolidated company as he held bonds. He complains also that no notice was given to the bondholders before or at the consolidation to convert their bonds into stock.

The defendant avers that ever since the consolidation, a share of stock of the consolidated company has been of much greater value than a share in the original La Fayette, Bloomington & Muncie Railway Company; also that the income bonds

<sup>1</sup> Appellant's citations: *St. Louis v. v. Hempstead*, 2 Wend. 109; 2 Wend. Allen, 13 Mo. 400; *St. Louis v. Russell*, 9 Mo. 403; *Morford v. Unger*, 8 Wis. 98; *North Yarmouth v. Skillings*, 45 Me. 138, 142; *Cool. Const. Me.* 59; *Blanchard v. Bessell*, 11 Ohio Lim., 192, 231, 232; *Wagn. Stat.* 1267, St. 96; 1 Dill. Mun. Corp., §§ 126, § 17; 1262, § 1. 128, 129, 1st Ed.; *North Hempstead*

became enhanced in value by reason of the consolidation; that the plaintiff had notice of the meeting called for ratifying the consolidation and opportunity of converting his bonds.

Opinion by DRUMMOND, J., who says that if the companies had the right to consolidate, it existed prior to the issue of the bonds, and it may be said they were issued subject to such right, and it becomes a grave question whether, in prescribing the terms of the consolidation, the company was obligated to give the same privilege to the holders of the income bonds as to the holders of the stock in the company, where such holders had not chosen to exercise the option conferred upon them by the terms of the bonds. If this right of conversion be an absolute and unchangeable one, unaffected in any way by the consolidation, then the conversion of the bonds into stock must be on the same terms as the conversion of the old stock into the stock of the consolidated company; or if the bonds are subject to the right of consolidation, the company should call upon the holders thereof to make the conversion. "It should clearly appear, not only that the bondholders had notice of the proposed consolidation and its terms, but that the opportunity should have been given to them of exercising the option conferred by the bonds. In other words, they should have had, before their rights could be said to be foreclosed, the power of choice, and it should appear that having this power, they had chosen to retain their income bonds instead of the stock thus proffered to them. I do not wish, unless it is absolutely necessary, and I can not say that I so regard it in this state of the case, to hold that this consolidation was illegal." Serious consequences would follow and affect a large amount of property.

The decision is placed on the ground that the bondholders have not had an opportunity of converting their bonds; it should affirmatively appear, that before the consummation of the consolidation, they were distinctly notified and declined to make the conversion. After the consolidation the conversion is no longer possible; the capital stocks of the original companies are destroyed and that of the consolidated company substituted. If the holder had full knowledge of the terms of the consolidation and full opportunity to make the conversion, and failed to do so, "I can not say" that he would afterward have the right for \$1,000 of bonds to obtain \$4,000 of stock. The



only decision the court now makes, is that it does not clearly appear by the answer that the holder of the income bonds had the right<sup>1</sup> which, by the terms of the contract, was conferred upon him.<sup>2</sup>

### SECTION TWELVE.

**John Hancock M. L. I. Co. v. W. N. & R. R. Co.**, 21 N. E. 864; 149 Mass. 44; **Day v. Same**, 151 Mass. 302; 23 N. E. 824.

#### Same topic.

Bondholders, having the right to convert their bonds into the stock of a company, will have that right, although the road is consolidated with another and thus forms a new company. In such case, on the stock being refused, they have a right to damages, and their damages are a demand on the new company which, by the consolidating statutes, is made subject to all debts, claims, contracts, etc., of the old companies.

### SECTION THIRTEEN.

**India M. Co. v. W. N. & R. R. Co.**, — Mass. —; 25 N. E. 975; **Sweet v. Same**, Id.

#### Same topic.

A statute, consolidating two companies, made the new or resultant corporation liable for all the duties, restrictions, obligations, debts and liabilities of the constituent corporations. The plaintiff held bonds against one of the constituents convertible into its stock on the completion of its road; held, that after the consolidation he was entitled to convert them into stock of the new company.

<sup>1</sup> Probably meant to say, "had in the opinion, the answer should do the opportunity of exercising the more than deny the allegation of the right." bill that no notice was given; it should

<sup>2</sup> The report fails to state how the affirmatively state that it had been question arose; it probably was on given. exceptions to the answer, for it is said

## SECTION FOURTEEN.

**Chicago, Milwaukee & St. Paul Ry. Co. v. Third National Bank, 134 U. S. 276; 10 S. C. R. 550. Affirming 26 Federal, 820.**

**Creditors may follow lessor's surplus property in lessee's hands.**

A railroad company being heavily in debt leased all its property to another company for 999 years, and also executed a deed of trust securing \$3,000,000 in bonds, which were to be sold for the benefit of said lessee company, and the lessee company agreed to pay the existing liens against the property and to complete the road. The lessee after paying said liens had a large surplus left, and devoted a portion of the same to the building of a bridge over the Mississippi, to be used in connection with the road.

Bill in equity.

It is held that a creditor of the lessor company can hold the lessee company for the funds accruing in excess of the amounts needed for paying the liens and completing the road; on the principle that when the lessor parts with all its property by lease, as in this case, and thus prevents the application of the property at its full value to the application of the lessor's debts, the lessee must be held accountable for any surplus remaining after paying the liens and completing the road as agreed; and the lessee could not divert this surplus to its own use, as by building the bridge, although the bridge may incidentally benefit the lessee.

While the doctrine is thus announced, and is laid down to this extent, yet the case as a whole is not entirely satisfactory as a precedent on this point, because the decision is really upon the construction of the terms of the agreement. The lessee had agreed to discharge the judgment liens; the plaintiff had no judgment at the time, but it had a suit pending which afterward ripened into judgment, and the court, upon view of all the circumstances, and of other language in the agreement, and considering that the liens were only about \$1,100,000, but the deed of trust was for \$3,000,000, finds from the fair interpretation of the contract that the defendant had really agreed to pay off the plaintiff's demand.

"Can a corporation in debt transfer its entire property by

lease so as to prevent the application of the property at its full value to the satisfaction of its debts?"<sup>1</sup> The lease and contracts in question produced a fund of nearly \$3,000,000; part was used for the benefit of the lessor company, and part the lessee appropriates to its own benefit. This it can not do and let the lessor company's debts go unpaid.

#### SECTION FIFTEEN.

**Gulf, C. & S. F. Co. v. Morris, 67 Texas 692; 4 S. W. 156.**

**Transfer of property illegal, and same held subject to execution against original company.**

The plaintiff, the Gulf, Colorado & Santa Fe Railway Co., by amending its charter, sought to purchase the Central & Montgomery Road. On June 12, 1882, some of the stockholders of the plaintiff purchased all of the stock and outstanding bonds of the Central & Montgomery Railroad and destroyed all these bonds, intending to sell said road to the plaintiff. The stockholders then sold the said Central & Montgomery road to the plaintiff, but executed no formal transfers. The plaintiff took possession of the road and operated it from that time on. The Central & Montgomery ceased to keep up its corporate organization. Morris having obtained a judgment against the Central & Montgomery Company on a cause accruing in part prior to June 12, 1882, and all of it out of said company's failure to carry freight for him, caused execution to be levied on the road-bed, iron, ties, etc., of the same. The plaintiff brings this suit to restrain sale under said execution. Injunction denied. The plaintiff claimed that the facts stated caused the title to pass at least equitably to it, and hence the property was no longer subject to the execution; and plaintiff claimed also, that by reason of the facts stated, the Central & Montgomery became dissolved and its property became that of the plaintiff. It is well settled that corporations organized for public purposes can not, by contract of sale, lease, or otherwise render themselves incapable of performing their duties to the public, or in any way absolve them-

<sup>1</sup> Railroad Co. v. Petters, 118 U. S. Works, 181 U. S. 852, 866; 9 S. C. 116, 124; 5 S. C. R. 387; Mellen v. Iron R. 781.

selves from the obligation which forms the main consideration for giving them a corporate existence, unless this be done by consent of the state, given through the charter or in some other manner. Hence, any contract through which such a corporation seeks to accomplish such a result is void, unless it has legislative sanction.<sup>1</sup>

A strictly private corporation may, by sale of its assets, become unable to carry on further the corporate business, for the public has no interest in the continuance of the same. The plaintiff had no legal power to buy the said road; it was chartered under the general law relating to the incorporation of railroad companies, and could have only the expressed powers, and those necessarily incidental thereto, which were granted.

The law gives a railroad company no power to buy another road. They may mortgage their roads,<sup>2</sup> and the title will pass on a foreclosure, but in such cases the corporation continues; the purchasers become in effect mere stockholders, the property, however, being relieved from debts which were not prior incumbrances on the property. These are the means by which the laws of this state authorize the sale of railroads. The incorporators of railroads are authorized to incorporate for *one purpose*—to construct, to own, to maintain, and to operate *such railroad*, that is, the road the company may construct under its charter; there is no authority to incorporate for several and distinct purposes; as, to construct a road for some other corporation, to maintain a railroad owned by some other corporation, to operate a railroad owned by some other corporation, or to become the owner by purchase of a railroad constructed and owned by some other corporation. If there be any doubt, the matter is made too clear by subsequent provisions of the law. The law requires articles stating the identical purpose of the company, the places from and to which it is intended to construct the proposed railroad, and that the company be authorized to proceed to carry into effect the objects set forth in the articles.

Neither does the amendment to the charter aid the plaintiff, although it is stated therein that it has the right to purchase the road in question. The amendment is made under the pro-

<sup>1</sup> Thomas v. Railroad Co., 101 U. S. 181, 182; Mor. Corp. 485, 490.  
71; Pierce, R. R., 10 Tayl. Corp. 305,   <sup>2</sup> Rev. Stat., 4219.

vision of the general law relating thereto; but a company can not, by amendment, claim powers greater than it could have taken by its original incorporation. The character of amendments which may be made, relate<sup>1</sup> to locating branch lines. The Central & Montgomery is still an existing corporation, and liable<sup>2</sup> for any debt incurred in the management of the road by whomsoever it may have been.

#### SECTION SIXTEEN.

**Frazier v. East Tenn. V. & G. R. Co., 88 Tenn. 188; 12 S. W. 537.**

**Judgment for injuries becomes lien against property in hands of foreclosure purchaser.**

A judgment creditor can enforce his rights against the property of a railroad even after it was purchased on a foreclosure sale by a committee of the holders of the bonds, a small part being paid in cash, enough to cover expenses, and the remainder in new bonds. The title was by deed and decree conveyed to the purchasers, who organized as the defendant company, and was regularly conveyed to such new corporation by the holders of the legal title. Such new corporation is not an innocent purchaser, as against complainant's judgment. The judgment, though rendered after the making of the mortgage, takes precedence over it by Act Tenn., March 24, 1877, which prohibits railroads from making any mortgages creating liens superior to judgments for injury to the person (as was this one). It was contended that the railroad had power under its charter (1869) to mortgage its road, and hence the legislature could not by subsequent act (1877) limit that power, but the power in the charter was to mortgage it only for the purpose of completing it; and it has long since been completed. Hence the power is found only in the act of 1877, and is, therefore, subject to the limitation thereof. Such power to mortgage the franchise or corporate property, essential to operation, must, by the great weight of authority, be expressly conferred. It is generally implied when the corporation is strictly private,

<sup>1</sup> Art. 4118, Rev. St.

<sup>2</sup> Central & M. Ry. Co. v. Morris, 8 S. W. R. 457.

as a factory or a mill. The reason for the distinction is found in the nature of the obligations and duties imposed upon a corporation in many respects a public corporation. Such a corporation can not, without express authority, abdicate the functions and duties imposed for a public purpose by either a sale or a lease; nor a mortgage, for a foreclosure would bring about an abandonment of its powers and responsibilities.

#### SECTION SEVENTEEN.

##### **Railroad Company v. Howard, 7 Wall. 392.**

**Surplus in value in purchaser's hands is subject to original company's debts.**

Complainants were judgment creditors of the Mississippi & Missouri Railroad Company, holding municipal aid bonds guaranteed by said company, but not otherwise secured. Said company's property was mortgaged to an extent greatly exceeding its value. A new corporation formed for the purchase of the road had offered to give \$5,500,000 for it, an amount exceeding its value, provided it could get title at once; the purchase was to be consummated as follows: The bondholders of the insolvent corporation agreed to take 84 per cent on the dollar, thus leaving over \$500,000 unappropriated, which sum it was agreed should be paid to the stockholders of the insolvent company, being 16 per cent on the dollar for them. All parties were to expedite the foreclosure and thus make title at once thereunder for the purchasing corporation. Accordingly a committee bought the bonds of a few stockholders who had instituted foreclosure proceedings, and having thus obtained control of the litigation, foreclosure decree and sale were had forthwith. The purchase was made and the 84 per cent paid to the bondholders. The fund of over \$500,000 was about to be divided among the stockholders, when the complainants filed their bill praying that it be decreed to them; said prayer was granted below and affirmed above.

The stockholders contended that the guarantee was *ultra vires* and void; a railroad corporation can no more guarantee the bond of a town than that of an individual to enable either

to raise money to pay the subscriptions to its stock.<sup>1</sup> The agreement prior to the sale was entirely between the bondholders and stockholders, and inasmuch as the amount due the former far exceeded all that was offered for the road, such offered price belonged in full to the bondholders, and if they saw fit to voluntarily yield a portion thereof to the stockholders—for the sake of obtaining an immediate foreclosure and to avoid the interposition of delays—it followed that what was thus to be given to the stockholders was money to which the complainants (unsecured creditors) had no right, and in the disposition of which they therefore had no concern.

Appellees contended that as the insolvent company had not appealed, its status as a debtor on the guaranteed bonds could not be denied in the supreme court<sup>2</sup> by the appellants, the stockholders and bondholders.

This, and appellee's other contentions, are adopted in the opinion of the court, which proceeds in the main on the theory that equity regards the property of a corporation as held in trust for the payment of its debts.

The creditors may pursue such property in whosoever's hands it has come, except a *bona fide* purchaser's. Stockholders are not entitled to any share in the division until the debts are paid. Creditors may pursue all remedies as well after a dissolution of a corporation by surrender or sale of its corporate franchises as before. All moneys derived from sale of corporate property are subject to the creditors' demands.<sup>3</sup> The laws of Iowa allowed the municipality to issue the bonds, and allowed corporations to make contracts the same as individuals; hence, as they could issue their own bonds, there is no reason why they could not transfer, and if advisable guarantee, the bonds lawfully received from the municipalities. Having power to contract, until the contrary be shown, it is presumed

<sup>1</sup> Citing *Bank of Genesee v. Patchin* Bank, 8 Kernan 309-314; *Bridgeport City Bank v. Empire Stone Dressing Co.*, 30 Barbour 421; *Morford v. Farmer's Bank*, 26 Id. 568. <sup>2</sup> *Story's Eq. Jur.*, 9th Ed., § 1252: *Mumma v. Potomac Co.*, 8 Peters 286; *Wood v. Dummer*, 3 Mason 308; *Vose v. Grant*, 15 Mass. 522; *Spear v. Grant*, 16 Mass. 14; *Curran v. Arkansas*, 15 Howard 307.

<sup>3</sup> *Holyoke Bank v. Goodman Paper Mfg. Co.*, 9 Cush. 570.



that their acts in that behalf were done in the regular course of their authorized business.<sup>1</sup>

The fund in question did not belong to the bondholders; they saw fit to take eighty-four per cent in full, and on receipt of same their lien was as fully discharged as though they had received the entire amount; what was left is necessarily the property of the corporation or the proceeds thereof, and consequently subject to its debts. The two railroad companies were the direct parties to the sale itself, and the fund realized accrued to the vendor company for use of its creditors.

### SECTION EIGHTEEN.

**Ritten v. Union Pacific Ry. Co., U. S. C. C., S. D. N. Y.**

**Bondholder's lien preserved.**

A bondholder, having a specific lien on property of a debtor company, may, by bill in equity, follow such property into the hands of another company receiving the same upon the consolidation of the former company with it.<sup>2</sup>

### SECTION NINETEEN.

**Gibbes v. G. & C. R. R. Co., State v. Same, 18 South Carolina 228.**

**Creditor's lien held not to have been waived.**

The state guaranteed the bonds of two railroad companies and reserved a statutory lien for its security; thereafter a law was enacted providing for their consolidation, providing also

<sup>1</sup>Canal Company v. Vallette, 21 830, cases in which mere contract Howard 424; Partridge v. Badger, creditors bring bills. Whipple v. 25 Barbour 146; Barry v. Mer. Ex. Union Pacific Ry. Co. (Kansas Supreme Court), seeking personal judgment against consolidated company for injuries sustained on constituent's road before consolidation. Hayward Farnum v. Blackstone Canal, 1 Sumner 46.

<sup>2</sup>Ritten v. Union Pacific Ry. Co., v. Andrews, 106 U. S. 672; Guaranty, U. S. C. C., S. D. N. Y., July 25, 1883, etc., v. Memphis Water Co., U. S. S. 13 A. & E. R. R. Cases, 874, distinguishing Walser v. Seligman, 18 Federal R. 415, and Jones v. Green, 1 Wall. seeks equitable relief.

for a waiver of said lien. Upon a foreclosure by a junior mortgage it was contended that said lien had been waived, but it is held that upon construing the law in its entirety, it is evident that the waiver should occur only in case consolidation be effected; that it was not effected and hence there was no waiver.

### SECTION TWENTY.

**McVicker v. American Opera Co. (National Opera Co., Intervenor), 40 Federal 861.**

**Assets paid for with new company's stock remain subject to old one's debts.**

A corporation which is insolvent holds its property in trust for its creditors, and can not transfer them to a new corporation, composed, with few exceptions, of the stockholders and officers of the former corporation, taking pay mainly in stock of the new company. "The new company, when organized, was expected to take the place of the insolvent American company, and succeed to all of its rights, and the latter became defunct." Even if there was no intent to hinder and delay the creditors of the old company, yet the transfer had that effect. On the theory that the two companies were distinct legal entities, the new one was not ignorant of the condition of the old one. Instead of holding its assets in trust for creditors, as it should have done, it being insolvent, the American company endeavored to place them where the creditors, for a time at least, could not so readily reach them. This was not valid as against the creditors, and subjected the property to attachment.<sup>1</sup>

<sup>1</sup> The purchasing company which pays only with its own stock is put upon inquiry as to the existence of creditors of the selling company. *Chattanooga, etc., v. Evans*, 66 Fed. Rep. 809.

It has been held, however, that it is not fraudulent, and not ground for arrest, for a partnership to transfer all its property to a corporation, receiving as payment the stock of such corporation, where the members of such firm then offer to deliver such stock to their creditors, either as payment or collateral security. *Kessler v. Levy*, 32 N. Y. Supp. 260.

## SECTION TWENTY-ONE.

**Montgomery Web. Co. v. Dieuelt**, 19 Atlantic, 428; 183 Pa. 585.

**Same topic.**

A corporation, being in debt, transferred all its property to a new corporation in which the stockholders were creditors or stockholders of the former corporation, and received their stock in the new one in proportion to their demands against and stock in the former corporation. All the creditors but one were thus arranged with; the demand of that one being then in dispute, but was soon after reduced to judgment. The new company was held to have taken the property subject to execution on such judgment. The Montgomery company is substantially the Aronia company under a new name. More than half its stock is held by the old stockholders by virtue of their ownership of the old stock, without any other consideration; as to these there has been merely a change of the corporate name; as to the other stockholders it appears they had been creditors of the old corporation, and hold their stock solely in consideration of their former claims as creditors; they are not purchasers for value, they are bound to take notice "of the taint of their co-adventurer's title." The same conclusion has been reached in a case in which the facts are similar.<sup>1</sup>

## SECTION TWENTY-TWO.

**Hancock v. Holbrook**, 40 La. Ann. 53; 3 Southern 351.

**Same topic.**

If the stockholders of a corporation which is in debt, form a new corporation and take stock in the new one in proportion to what they held in the old, giving no new consideration therefor, except to transfer the assets of the old to the new one, the latter corporation will, to the extent of property thus received, stand in the place of the old as regards liability to its existing creditors,<sup>2</sup> and such transfer will be set aside at suit of such creditors.

<sup>1</sup> Insurance Company v. Transportation Company, 13 Federal Reporter, 11 Federal 362; the latter case is upon a statute for the distribution of etc., 13 Federal 516; Horner v. Car-  
516.

<sup>2</sup> See also Hibernia v. St. Louis, the assets of a dissolved corporation.

## SECTION TWENTY-THREE.

**Hibernia Ins. Co. v. St. Louis & N. O. Transportation Co., 10 Federal 596.**

**Same topic; judgment at law not necessary.**

Bill by an insurance company alleging that it had paid for a lost cargo and had been subrogated to the rights of the shipper. Bill alleges also that the defendant, Babbage Transportation Company, had caused the loss through its negligence. No judgment *in rem* or *in personam* at law or in admiralty had been recovered against the transportation company. After said loss occurred, said defendant fraudulently transferred all its boats, barges, etc., to the other defendant, the St. Louis & New Orleans Transportation Company; Lowery, one of the defendants, was president and principal stockholder, and caused said transfer to be made. Prayer of the bill is for a decree as for a moneyed judgment for amount of said loss, also to charge said property with the lien thereof, and for an injunction preventing its further transfer.

Demurrer to bill was overruled, excepting as to bill joining Lowery; he was held improperly joined and bill dismissed as to him.

Ordinarily the shipper's remedy for his loss is *in personam*, or *in rem* in equity, but there being here different losses and on different vessels, they can not be joined *in rem*—whether *in personam* or not need not be considered; such joinders are frequent in equity, and must rest here upon the allegations as to the fraudulent transfer, the same having been made with knowledge of the plaintiff's claim and impliedly to defeat the same.

The plaintiff had no right as against the negligent company, until after judgment, excepting his admiralty right *in rem* against the vessel which caused the loss.

Cases reviewed<sup>1</sup> would not seem to include in their principle the one in hand; question still remains whether there can here be a right in equity without prior judgment at law.

<sup>1</sup> Garrison v. Memphis Ins. Co., 19 How. 312; Case v. Beauregard, 99 U. S. 119; S. C., 101 U. S. 688.

Lowery is not a proper party to the bill;<sup>1</sup> the suggestion that he may be held as a stockholder under the Missouri statute would require proceedings in compliance therewith.

The bill, however, has equity as to the corporations. Facts are that there are demands against the Babbage Company, not in judgment nor secured by lien; that the said company transferred all of its property without consideration, to the other company, latter having full knowledge of said demands; the only remedy for the creditors is to compel the latter company to hold said property subject to such demands when established. The former company is practically dissolved, the latter formed possibly for the very purpose of depriving the former's creditors of all adequate means of realizing their just dues.

"There is too much of this, as judicial experience has shown. The change of organization is too often merely a change of name designed solely to defeat the right of creditors." If the new corporation knew of the debts and took the property without consideration, it takes it *cum onere*; equity will prevent the success of such a scheme which operates as a fraud whether it had been so intended or not, but is liable, of course, only to the extent of the property received; as to questions concerning the use or disposal of the same during litigation, the court is open for further order, which may be needed to preserve the rights of the parties.

The last case came again before the court,<sup>2</sup> upon plea and proofs. Opinion by McCrary, C. J. Treat, D. J., concurring, holds the property in defendant's hands subject to the debts of the old company. The facts found are that the new company paid to the old company the estimated value of the property, \$92,000, by delivering to it \$50,000 of the new company's stock and assuming to pay and actually paying \$42,000 (supposed to be all) of the old company's debts, not including complainant's therein. The officers and stockholders of both companies knew of the loss in question, but no demand had been made for the payment of the same and they did not know that any would be made.

The stockholders in the two companies were substantially identical. Lowery was a large stockholder and an officer in

<sup>1</sup> As to multifariousness in this class of cases, the court says the matter is well considered in *Hayes v. Dayton*, 18 Blatchf. 420.

<sup>2</sup> 13 Fed. 516.

each. All stockholders consented to the sale. This sale is fraudulent as to the creditors of the old company not assenting; the purchaser knew it was depriving the seller of the means of paying its debts. The fair inference is that the old company was about to be dissolved and cease to be; it was to be absorbed by the new company. This is the inevitable consequence of the formation of the new company composed substantially of the same persons, to transact the same business at the same places. Probably the old company has not elected officers and will not; hence it is doubtful whether process could be served, and if it were, a judgment would be of no avail except to follow the stock paid over to it by the new company, which has doubtless been disposed of, or at any moment may be. Equity will not drive the creditor to such doubtful redress. There is a distinction between a corporation and a natural person; the latter may sell all his property *bona fide* and for a fair consideration, and the buyer need not see to it that the seller pays his debts with the proceeds of the sale. "A corporation, unlike a natural person, by disposing of all its property, may not only deprive itself of the means of paying its debts, but may deprive itself of corporate existence and place itself beyond the reach of process of law; at all events, equity will not permit the owners of one corporation to organize another and transfer to it all the corporate property without paying all the corporate debts."

TREAT, D. J., concurring. The evidence sufficiently discloses that the new corporation was a mere continuance of the old, with substantially the same parties in interest—a mere change of name. The new must respond for the debts of the old, at all events to the amount of the property received, and possibly to the full extent; that is, if property sufficient therefor is in its possession. This is a proceeding in equity wherein mere colorable pretenses are to be disregarded. "Shiftings of corporate names can not defeat positive rights, any more than the change of the name of a natural person can absolve him from his personal obligations. If the new corporation has paid the full value of the property acquired, then it may possibly not be answerable; but if it has merely issued its stock therefor, it is liable to an amount equal to such stock; said stock represents the value of the property, subject to the old company's debts."

## SECTION TWENTY-FOUR.

Hill v. Gruell, 42 Ill. App. 411.

Same topic; personal liability of managers making the transfer.

The managers of a corporation, who, upon its dissolution, arranged to transfer all the assets to a new corporation, the stockholders of the former corporation receiving stock in the new corporation instead of their former holdings, become personally and severally, as well as jointly liable to creditors of the former corporation to the extent of the value of such assets. The defendants in such case are chargeable, not as stockholders, but as trustees who have violated their trust and diverted the assets of the former corporation by dividing the same among themselves, and then receiving as their equivalent, stock in the new corporation, instead of applying the same to the debts of the dissolved corporation.<sup>1</sup>

## SECTION TWENTY-FIVE.

## Sundry instances.

Upon an illegal consolidation of insurance companies, with loss of assets, the directors become personally liable to the receiver of the company. Remedy is in equity, under ten years' limitation, not under six at law. Pierson v. Cronk, 13 N. Y. Supp. 845.

The creditor of the old corporation who became such because of his being *cestui que trust* in a fund which had been delivered to the old corporation may, in equity, recover amount of his claim from a new corporation to which the old has transferred its property, receiving in payment the stock only of the new company. Barksdale v. Finney, 14 Gratt. 338.

The creditor of the constituent may, in equity, directly follow property turned over to the consolidation; not decided whether he may do so at law. Harrison v. Union Pacific Ry. Co., 13 Federal Rep. 522; S. C., 4 McCrary 264.

<sup>1</sup> Hill v. Gruell, 42 Ill. App. 411, the detriment of creditors, transfer based on Clapp v. Peterson, 104 Ill. assets to a stockholder in payment 26, and cases therein cited, which see, and extinguishment of his stock. holding that a corporation can not, to



Judgment creditor is entitled to a receiver for the property transferred by his debtor corporation to another, receiving from latter its stock only in payment. *Barclay v. Quicksilver M. Co.*, 9 Abb. Pr. N. S. 283.

Such stock, however, when received and distributed among the old company stockholders may be by them sold for cash, or when so agreed, redeemed for cash by the new company; and a party thus receiving cash is not, in the absence of fraud, liable in a suit by the old company's receiver; there is no privity of contract between the defendant and such receiver. *Bent v. Hart*, 73 Mo. 641, affirming 10 Mo. App. 143.

If the new company buys all the old company's assets and the bulk of its stock and pays by giving its own stock and draft, it is a constructive (and perhaps an actual) fraud upon the old company's creditors, for it thereafter to receive back its draft from the old company and return to it the stock for retirement. This leaves the old company without assets and without the draft (\$900,000), and hence, receiver will be appointed to collect said sum from the new company for the benefit of the old one's creditors. *Alexander v. Relfe*, 74 Mo. 495.

The successor company taking, not as creditor but as owner, all the property of the prior company, becomes liable directly for the debts of the former, at least to the extent of the value of the property. *Brum v. Merchants, etc., Ins. Co.*, 16 Fed. Rep. 140.

The legality of the existence of the successor corporation may be collaterally assailed; plaintiff levied upon chattels under execution against a firm; defendant seized the same chattels under execution against a corporation, successor to said firm, in which corporation the legal title to said chattels had vested; plaintiff is allowed to show that the corporation's organization was fraudulently devised to hinder the firm's creditors. *Booth v. Bunce*, 33 N. Y. 139.

Judgment had been obtained against a consolidation, which consolidation was thereafter declared illegal; plaintiff is held upon notice to each constituent to be entitled to execution against both, as they were the real defendants under the consolidated name, and he was not a party to the dissolution proceedings, and is not bound thereby. *Ketcham v. Madison, etc., Ry. Co.*, 20 Ind. 260.

## CHAPTER XI.

## DEMANDS OF CREDITORS DENIED.

The constituent corporations are not liable upon the notes of an illegally constituted consolidation of which they were part, the notes being for an undertaking without the powers of such constituents to engage in.

Questions in this chapter are chiefly upon statutory construction, resulting in following conclusions: The constituent company by act of consolidation becomes extinct and its creditors *ipso facto* become creditors of the consolidation and must sue it, and it alone, upon their demands; and judgments against the constituent can be revived on *scire facias* only against the consolidation.

Succeeding corporations who are purchasers of the property of their predecessors, either directly or upon foreclosure proceedings, do not thereby become subject to the former's debts; even if, as part of the purchase consideration, they assume certain debts, they are not liable for others.

Stockholders of the preceding corporation (and persons holding under such stockholders) have no right to follow the assets of a corporation sold in good faith to a succeeding corporation, and paid for with the latter's stock; their remedy is to obtain the stock.

The distinction should be observed between cases in which the succeeding corporation is a mere "re-organization," obtaining the property upon equitably the same uses as it was held by the former, and those in which the successor, even if called re-organization, is in reality a new corporate creation and obtains the property upon new considerations; the former does, and the latter does not, take the property subject to the predecessor's debts; nor is liability created even if such latter has eventually the original mortgagor company merged into it.

## SECTION ONE.

**Pearce v. Madison, etc., Company, 21 How. 441.**

**Creditors have no claim when consolidation and consideration are both ultra vires.**

Two railroads were consolidated by agreement, assuming a joint name and a common board of management and conducting the business of both lines; while thus conducted, the president of the consolidated company gave the notes in suit in payment of a steamboat which was to run in connection with the railroads; thereafter the relation between the corporations was declared illegal and dissolved in due course of law, and at the commencement of the suit each corporation was managing its own affairs. The plaintiff had notice of the facts and his recovery is denied.

Following is opinion in full:

The defendants are separate corporations, existing under the laws of Indiana, and were created to construct distinct lines of railroad that connect at Indianapolis, in that state. The plaintiff is the assignee of five promissory notes, that were executed under conditions set forth in the declaration, and of which he had notice. The two corporations (defendants), some time before the date of the notes, were consolidated by agreement, and assumed the name of the Madison, Indianapolis and Peru Railroad Company, and under that name, and under a common board of management, conducted the business of both lines of road.

While the business of the two corporations was thus directed and managed, the president of the consolidated company gave these notes in its name in payment for a steamboat, which was to be employed on the Ohio river, to run in connection with the railroads. After the execution of the notes, and the acquisition of the boat, this relation between the corporation was dissolved by due course of law, and, at the commencement of the suit, each corporation was managing its own affairs. The plaintiff claims that the two corporations are jointly bound for the payment of the notes, but the circuit court sustained a demurrer to the declaration.

The rights, duties and obligations of the defendants are de-

financed in the acts of the legislature of Indiana under which they were organized, and reference must be had to these to ascertain the validity of their contracts. They empower the defendants respectively to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction. Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither managers nor stockholders of the corporation shall transcend their authority.

In *McGregor v. The Official Manager of the Deal & Dover Railway Co.* (16 L. & Eq. 180), it was considered that a railway company incorporated by act of parliament was bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatever, and that a contract to do something beyond these was a contract to do an illegal act, the illegality of which, appearing by the provisions of a public act of parliament, must be taken to be known to the whole world. In *Coleman v. The Eastern Counties Railway Co.* (10 Beav. 1), Lord Langdale, at the suit of a shareholder, restrained the corporation from using its funds to establish a steam communication between the terminus of the road (Harwich) and the northern ports of Europe. The directors of the company vindicated the appropriation as beneficial to the company, and that similar arrangements were not unusual among railway companies. Lord Langdale said: "Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made. But I apprehend

that it has nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by the acts. But it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided that the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders.

“There is, however, no authority for anything of that kind. It has been stated that these things, to a small extent, have been frequently done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of parliament, under which those acts are done, they furnish no authority whatever. In the *East Anglian Railway Company v. The Eastern Counties Railway Company* (11 C. B. 803), the court say the statute incorporating the defendants’ company gives no authority respecting the bills in Parliament promoted by the plaintiffs, and we are therefore bound to say that any contract relating to such bills is not justified by the act of Parliament, is not within the scope of the authority of the company as a corporation, and is therefore void.”

We have selected these cases to illustrate the principle upon which the decision of this case has been made. It is not a new principle in the jurisprudence of this court. It was declared in the early case of *Head v. Providence Insurance Company* (2 Cr. 127), and has been reaffirmed in a number of others that followed it. (*Bank of Augusta v. Earle*, 13 Pet. 519; *Perrine v. Ches. & Ohio Railroad Company*, 9 How. 172.)

It is contended that because the steamboat was delivered to the defendants, and has been converted to their use, they are responsible. It is enough to say, in reply to this, that the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner’s interest. His suit is instituted on the notes as an indorsee; and the only question is, had the corporation the capacity to make the contract, in the fulfillment of which they were executed? The opinion of the

court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority.

Judgment affirmed.<sup>1</sup>

## SECTION TWO.

**Indianola R. R. Co. v. Fryer, 56 Texas 609.**

**Creditor's demand on the constituent company is extinguished because such company has ceased to exist.**

Plaintiff, Fryer, had a contract in 1869 with the Indianola Railroad Company, and completed his work on May 31, 1871, and claimed his compensation.

On May 19, 1871, said company was, by an act of the legislature, consolidated with the San Antonio & Mexican Gulf Railroad, under name and style of Gulf, Western Texas & Pacific Railroad.

Suit commenced against the Indianola company in 1872; amendment filed in 1874, bringing in the consolidated company.

Plaintiff had judgment below against the original company, which appealed; the Supreme Court dismisses the appeal, holding the judgment void and the appeal ineffectual. The consolidated company had judgment below, from which plaintiff takes error, but same is dismissed because of failure to file bond.

“An error fundamental in character and going to the foundation of the action, though not assigned, is made manifest by the record.” The consolidation acts provided that the consolidated company should have all the corporate rights, powers and privileges belonging to the two companies; that the two companies should be one company; the capital stock might be increased to an amount equal to the aggregate of the capital of the two companies;<sup>2</sup> that the consolidated company should have the powers, rights and privileges as provided in the original charters, under the name and style of the Gulf, Western

<sup>1</sup> Notes, given in part payment of can not be enforced, it appearing stock, such stock being bought for that such consolidation was illegal. the purpose of controlling a corpora- Tompkins v. Compton (Ga.), 21 S. E. tion and thereby compelling the R. 79. minority to submit to consolidation, <sup>2</sup> Special Laws, 1870, pp. 101, 102.

Texas & Pacific Railway Company, which was also authorized to borrow money on bonds, etc.<sup>1</sup>

Hence, the "Indianola Railroad Company" was no longer in existence when suit was brought, nor at any time since. "We are clearly of the opinion that from and after the passage of the act of 1871, that company ceased to exist; that its power to sue and capacity to be sued by that name had been extinguished, and that there was no such corporation as the Indianola Railroad Company. All the powers and rights that it had ever enjoyed by virtue of the legislative charter had passed to, and vested in another corporation, with a fixed and distinctive name, with all the capacities to sue and be sued that had theretofore been vested in the two old companies. This change had been wrought by the agreement of parties sanctioned by the legislative enactment."

The case differs from the Georgia Railroad cases,<sup>2</sup> in which certain rights appertaining to the old companies are held to have survived to the consolidated company; here the only question is whether there remained any such corporation as the "Indianola Railroad Company," with power to sue or be sued, known to the law; as to all matters pertaining to the two old companies, the only person known to the law with capacity to sue and be sued was the "Gulf, Western Texas & Pacific Railway Company." Whatever claim Fryer had against the old Indianola Railroad Company, if it constituted a liability against the same, could have been enforced against the Gulf, Western Texas & Pacific Railway Company. It had succeeded to all the rights and assumed all the liabilities of the extinct corporation.<sup>3</sup>

<sup>1</sup> Special Laws, 1871, pp. 425 and 426.

<sup>2</sup> 92 and 98 U. S. Reports.

<sup>3</sup> The City of Indianola v. Indianola R. R. Co., 56 Texas 594; T. & P. R. W. Co. v. Murphy, 46 Tex. 357; Stephenson v. T. & P. R. W. Co., 42 Tex. 166, 167.

process for its debts, Bruffett v. The Great West. R. R. Co., 25 Ill. 357; 1 Wetherell R. R. Cases, 250; Seymour v. Long Dock Co., 20 N. J. 396; 1 Withrow Am. R. R. Cas., 250; Stall v. S. P. R. R. Co., 24 Tex. 125.

Citations for Fryer contained, among others, the following: On the propositions that the Indianola road could be dissolved only by act of legislature, that the consolidation does not have that effect and would not place it beyond the reach of Citations for Fryer contained, among others, the following: On the propositions that the Indianola road could be dissolved only by act of legislature, that the consolidation does not have that effect and would not place it beyond the reach of

It may be further observed that upon the dissolution of a corporation (as for instance upon order of dissolution entered by reason of its insolvency, Sec. 2429 N. Y. Code of Civil Procedure), actions for personal injuries which would abate by reason of the death of a natural person (defend-



ant) will abate also against such corporation, if pending but untried when such order is entered, and in the absence of an enabling statute can not be revived or continued against the receiver. *Re New York Oxygen Co.*, 83 N. Y. Supp. 726; 86 Hun 489, citing *Grafton v. Union F. Co.*, 19 N. Y. Supp. 966; *Sturges v. Vanderbilt*, 73 N. Y. 384; *McCullough v. Norwood*, 58 N. Y. 562. In *Marstaller v. Mills*, 143 N. Y. 398, 38 N. E. 870, the court examines the statutes relating to corporations and providing for payment of their "liabilities" and for the protection of their "creditors" (upon dissolution), and concludes that they are broad enough in their intent to embrace and provide for the payment of demands for personal injuries, though undetermined and not even in suit before the dissolution.

For further discussions of the common law rule, and its modification by statute, concerning the survival of actions as against corporations after their dissolution, consult *Hepworth v. Union F. Co.*, 16 N. Y. Supp. 692; 131 N. Y. 645; 30 N. E. R. 867; *Martin v. Walker*, 12 Hun 46; *Ford v. Johnston*, 7 Hun 563; *Baker v. Gilman*, 52 Barb. 26; *Lichtenberg v. Herdtfelder* (N. Y.), 8 N. E. R. 526; *McCullough v. Norwood*, 58 N. Y. 562.

*People v. Troy Steel & Iron Co.*, 31 N. Y. Supp. 337, 82 Hun 303, draws the distinction between judgments in sequestration, appointing a receiver of a corporation, and a judgment of dissolution and receiver in an action by the people; the latter does, but the former does not, cause an abatement of an action pending for personal injuries; reviewing *Del Valle v. Navarro*, 21 Abb. N. C. 136; *Button Co. v. Sylvester*, 68 Hun 401, 22 N. Y. Supp. 891; *Sturges v. Vanderbilt*, 73 N. Y. 384-388; *Bank v. Colby*, 21 Wall. 609-615; *People v. Insurance Co.*, 17 Wkly. Dig. 563; *People v. Knickerbocker L. I. Co.*, 106 N. Y.

619, 623; 13 N. E. R. 447; *Hegerich v. Keddie*, 99 N. Y. 258; 1 N. E. R. 787; *Greeley v. Smith*, 8 Story 657, Fed. Cas. No. 5748.

The note to the last refers also to *Bank v. Colby*, 21 Wall. 615; *Kelly v. Mississippi C. R. Co.*, 1 Fed. Rep. 569; *Devereaux v. City*, 29 Fed. Rep. 750; *Sturges v. Vanderbilt*, 73 N. Y. 390; *City v. Commercial Bank*, 68 Ill. 350; *Att'y Gen'l v. C. & E. R. Co.*, 112 Ill. 534, 538; *McCartney v. C. & E. R. Co.*, Id. 621.

Plaintiff's merging in another corporation works no abatement; enabling statutes construed. *Edison etc., Co. v. U. S. Co.*, 3 C. C. A. 83.

A plea by a defendant corporation to the effect that it has been dissolved since the date that it has been served with summons is not only invalid as a plea but void as a record, and should be stricken from the files just as in case of a natural person. If an attorney should file a plea that such person has died since being served with summons, the death of the defendant ends the attorney's retainer; all proceedings are void; the proper steps to be taken are to substitute the legal representatives of the defendant. *Wamsley v. H. L. Horton & Co.*, 34 N. Y. Supp. 306. Judgment should not be entered against a defunct corporation; publication of notice should be set aside when a former secretary suggests to the court facts showing that such corporation has not done business for over twenty-six years, all its property having been sold on judicial sale. Exhaustive opinion with numerous citations. *Combes v. M. & M. R. Co.* (Wis.), 62 N. W. R. 89.

The principal case (*Railroad Co. v. Fryer*) is, in *Evans v. Interstate Rapid Transit Company* (Mo.), 17 S. W. R. 489, distinguished as being an action commenced after the consolidation had been effected, and hence it was improperly brought against the constituent, whereas, had

it been brought thus before consolidation, it would not abate by reason of the consolidation; citing *Lindell v. Benton*, 6 Mo. 361; that pending legal proceedings are not affected by the expiration of a charter, and that a pending suit abates not by reason of consolidation. *Railroad Co. v. Musselman*, 2 Grant's Cas. 848; *Railroad Co. v. Evans*, 6 Heisk. 607; *Shackleford v. R. R. Co.*, 52 Miss. 159; *Wood, Ry. Law*, p. 1688; *Wait, Insolv. Corp.*, § 448.

For complete summary of the law as to abatement of pending actions upon dissolution and kindred topics, consult *Cook on Stock and Stockholders and Corporations*, 3d edition.

### SECTION THREE.

**Mumma v. The Potomac Company, 8 Peters 281.**

**Judgment against the original company is extinguished.**

Plaintiff obtained a judgment in June, 1818, against the Potomac Company, which company was by act of legislature of January, 1824, succeeded by the Chesapeake & Ohio Canal Company; the former company's charter being surrendered by it and accepted by the latter, whereby, according to said act, the former company's charter was declared vacated and annulled, and all the powers and rights thereby granted to the Potomac Company were declared vested in the new company. On 18th of April, 1828, plaintiff obtained a writ of *scire facias* to revive said judgment. Decision is that he take nothing by his writ, and this ruling is affirmed. Plaintiff must have known when he made his contract, that the corporation might at some time be dissolved; hence he contracted with reference to such possibility, and therefore the dissolution is not an unlawful impairment of his contract; to require corporations to endure to await the termination of contracts might keep them in existence in perpetuity and contrary to the public good. The corporation is dissolved and dead, and *scire facias* is as inoperative against it as it would be against a dead man. The creditor's demand may, however, be asserted against any property of the corporation which has not passed into the hands of *bona fide* holders, for it is still a trust fund for the creditors;<sup>1</sup>

<sup>1</sup> The state itself, though being the sole stockholder of a bank, has no power, upon the bank's insolvency, to withdraw portions of its capital and appropriate the same to reimburse itself for the moneys by it advanced to the bank. The creditors of the bank who became such upon the reliance that it possessed the stated and announced capital have

moreover, the same legislation gave all the old company's creditors the right to take stock in the new, and if declining to do so, required the new company to pay him annually such dividend of the net amount of the revenues of the Potomac Company on an average of the last five years preceding the organization of the new company as his demand may bear to the total debt (\$175,800) of the old company, thus furnishing an equitable mode, and the only one practicable, for distributing the old company's assets; a mode analogous to the distribution of the assets of a declared insolvent debtor.

#### SECTION FOUR.

**Vose v. Cowdrey, 49 N. Y. 336.**

**Creditor's mere right to receive bonds does not create an equitable lien.**

Plaintiff having furnished iron to a railroad company, received first mortgage bonds therefor, and was to receive still more bonds for further amounts of iron delivered, but though entitled to such additional bonds, the plaintiff did not receive them. Thereafter the road was sold under the foreclosure of said mortgage, whereupon the plaintiff and the other bondholders formed a corporation for buying and receiving the property, and for allotting to the plaintiff, and the others, stock in the new company in proportion to the amounts of said bonds held by them respectively.

Thereafter the plaintiff asserted that he was equitably entitled to receive the additional bonds for his additional delivery of iron; that although he had not received them, yet equity treats that as done which should have been done, and hence he should be considered as having received them, and that to their extent he should receive new stock; also claimed certain damages growing out of the transaction, and as to these claimed to be a creditor of the old company and entitled to

the right to have such capital maintained for the purposes of their security. *Curran v. The State of Arkansas*, 15 Howard 307 (three justices dissent, holding that the state had not impaired the obligation of any contract, but had merely paid itself as a creditor).

follow its assets into the hands of the new, as being a trust fund for the old company's creditors.<sup>1</sup>

The decision is adverse to this contention. The facts show that the property came into the present owner's hands freed from any trust for the plaintiff. The organizers of the purchasing company were certain classes of the creditors of and not stockholders in the insolvent company. Neither said company nor its stockholders made any contract nor agreement for the sale of the road. The foreclosure was not collusive; the sale was fairly conducted. The purchasers stood in no relation of trust or confidence either to the former company or to the other creditors, and were in no respect incompetent to purchase or hold the property in their own right; hence, they are *bona fide* purchasers and obtain the property free from any trust except such as is involved in the agreement of purchase; no term thereof covers the claim of plaintiff as to the bonds which were not issued to him or the claim for damages, and as he consented to said agreement as to the bonds of which he was the owner prior to that time and now holds new stock under it, it follows that he can not attack said agreement for fraud, as he still claims under it; nor can he in any manner allege protection under it except in accordance with its provisions, the terms of which are precise and distinct, making exact provision for the various interests involved, and have been acted upon, and distribution has been made in pursuance thereof. However equitable plaintiff's claim may be as a creditor of the former company as between it and himself, to treat that as done which they ought to have done, it certainly would not be equitable as to third parties who made their arrangements predicated upon what the company had actually done, to extend this fiction to them, so as to affect their rights between each other.

<sup>1</sup> In accordance with *Railroad Co. Curran v. Arkansas*, 15 How. 307. *v. Howard*, 7 Wall. 392; *Story's Eq. Citations by counsel, contra*, were: § 1252, 9th Ed.; *Mumma v. Potomac* *Velas v. M. R. R. Co.*, 17 Wis. 497; *Co.*, 8 Pet. 286; *Wood v. Dummer*, *M. Co. v. St. P. Co.*, 6 Wall. 745; 8 Mason 308; *Vose v. Grant*, 15 Mass. *Croushay v. Soultter*, 6 Wall. 640. 522; *Spear v. Grant*, 16 Id. 14;

## SECTION FIVE.

**Crowshay v. Soutter, 6 Wall. 789.****Lien waived by agreeing to a sale.**

Upon the foreclosure of a railroad mortgage, the bondholders formed a new company, which was to buy the property at the foreclosure sale, and they were to receive of the stock of such company an amount in proportion to the bonds. The bondholders agreeing to this, and who delivered their bonds and received the new stock, are held to have elected to abide by the action of the trustees having charge of the matter, and to be estopped from objecting to the confirmation of the sale.

## SECTION SIX.

**Fogg v. Blair, 138 U. S. 534; 10 S. C. R. 338.**

**Purchaser paying by assuming certain debts and obligations takes roads free from other debts as liens, though it may be liable for same by reason of assuming them.**

A railroad company sells all its property to a new company, composed principally of the same persons and the same officers as the old. The new corporation as consideration agrees to pay certain specified debts and to perform certain contracts of the old corporation. To make these payments, the new company issued bonds secured by mortgage on the road. Fogg had a demand against the old company prior to the making of the mortgage, but did not reduce it to judgment until thereafter; his demand was not one of those for which the statute gave a lien, nor did his judgment decree it to be a lien on any property. A proceeding was brought to foreclose the mortgage; Fogg, by cross-bill, asserted the priority of his judgment over the mortgage. The decision was adverse to his contention. It is held that his demand did not affect any property; it did not become a lien until reduced to judgment, and then only as subsequent to liens, which preceded it in point of time. The new company was liable thereon, because it had assumed it, and so, too, it may be admitted that the property of

a company is a trust fund for the payment of its debt, and that when it transfers the whole of it to another company, such other company might become liable for such debts, but even that does not prevent such other company from mortgaging the property *bona fide* for a valuable consideration.<sup>1</sup>

### SECTION SEVEN.

**Leathers v. Janney et al., 41 La. Ann. 1120; 6 Southern 884.**

**Holder of stock as collateral has no equitable lien on the corporate property sold in good faith.**

Three corporations existed, each owning and running a steamboat, when, in order to overcome a disastrous competition it was agreed that a new corporation should be formed with a capital equal to the aggregate of the capital of the three companies; that the boats should be transferred to the new company, and that stock of the new company be issued to each stockholder of the old in the proportion of his stock therein, all of which was done.

Janney, a stockholder in one of the original companies, pledged his stock with Leathers as security for a debt. The stock of the new company was, however, delivered to Janney without requiring him first to return his old stock and no one but he and Leathers knew of the pledge. Brown was president and manager of the company in which Janney had held his old stock, and he was also president and manager of the new company.

Leathers brings his suit, making defendants these various individuals and corporations, and assailing the transactions as fraudulent and beyond the powers of the corporations, and claiming an equitable lien on the property of said original company. Decision is adverse to his contention. The sale was *bona fide*, on a good consideration, openly and publicly negotiated and consummated. Brown, though manager of both

<sup>1</sup> An instructive case is *Chicago, issuing its own stock in payment of etc., Co. v. Ashling*, 56 Illinois Appellate 327; though the enabling statute term the transaction a purchase, yet when one corporation obtains the property and franchise of another, same, the result is really a consolidation, and the new corporation becomes liable by statute for the debts of the old. (Briefs and opinion should be read in full.)

the contracting parties, yet acted under authority from both. A corporation may sell all of its property, unless restrained by its charter, if it acts under proper authority.

Janney committed a fraud on plaintiff in not delivering the stock to him; the question whether Brown and the original company which he represented are liable to plaintiff for having delivered the stock to Janney and not to the plaintiff, is not raised in this form of action nor on this record; and was expressly reserved in the decision in order to be determined in an appropriate action.

The buying corporation is relieved from any liability; it bought in good faith, and delivered the purchase price, to wit, certificates of its own stock, to Brown, the manager of the selling company; it owed no duty to the stockholders of the selling company, to see whether Brown gave to them their shares of the price.

Authorities exist to the effect that when a corporation sells or transfers its entire property to a purchaser, knowing the fact, the latter is chargeable with knowledge that the property is subject to the corporate debts, and that equity will, in proper cases, allow the corporate creditors to follow the property into the hands of the purchaser for satisfaction of their claims.<sup>1</sup> But no authority exists compelling the purchaser from a corporation to see that the purchase price is divided among its stockholders; there being the absence of fraudulent connivance or collusion to wrong the stockholders, the officers of the selling corporation are its agents for the purpose of receiving and dividing the price, and the stockholder must look to them for protection.<sup>2</sup>

## SECTION EIGHT.

**Stewart's Appeal, 72 Pa. St. 291.**

**Purchasers on foreclosure take property free from unsecured debts.**

The Pittsburgh, Fort Wayne & Chicago *Railroad* Company mortgaged its property; and when the same was about to be

<sup>1</sup> *Mumma v. Potomac Co.*, 8 Peters 281; *Wood v. Dummer*, 3 Mason 308; *Bank v. St. John*, 25 Ala. 566; *Smith v. Huckabee*, 53 Ala. 191; *Vose v. Grant*, 15 Mass. 522; *Story, Eq. Jur.*, (9th Ed.), § 1252. <sup>2</sup> *Fee v. Gas Light Co.*, 85 La. Ann. 418, is said to have no application whatever.



foreclosed, an act of the legislature was passed<sup>1</sup> providing that the persons who should become purchasers at such foreclosure should be a body corporate under the name of the Pittsburgh, Fort Wayne & Chicago *Railway* Company. The foreclosure was had and the purchase made, and it is held that the latter company (to whom the property was conveyed by the trustees who had bought it at the foreclosure) did not take the property subject to the debts of the former company.

Contention of the creditor, and the finding of the master in his favor, were essentially to the effect that the latter company was but a "reorganization" of the former, and hence took the property thereof charged with a trust in favor of the other creditors. Facts relied on to support this contention were, in brief, that the original road obtained statutory enactments in several states allowing reorganization; passed corporate resolutions thereunder; the officers remained substantially the same; the stockholders of the old corporation became stockholders in the reorganization without purchasing any stock; the foreclosure was carried through without any defense being interposed. Hence, the master concludes that all this machinery was resorted to merely to get the property away from the unsecured creditor's reach; that the defendant company is not a new and independent organization, but simply a reorganization of and substitute for the original corporation, and that it holds the property subject to the debts thereof.

The court, however, differed from the master and dismissed the bill. The supreme court sustains the dismissal.

The defendant is decided to be a new and distinct organization, created on the contingency of the foreclosure sale; the term "reorganization," used in the title of the act, "can not overcome the very facts of the case, and the language and intent of the law;" the foreclosure sale was *bona fide*, and adversary, and the sum bid, \$2,000,000, was actually paid to the receiver, and the property vested in the purchasers, through whom the new company derived its title. Complainant contends that the new company came into possession of the property under such voluntary arrangement with the old company's stockholders as would leave the property liable to the creditors

<sup>1</sup> Pamphlet Law 498, March 31, 1860.

of the old company.<sup>1</sup> But the act in question by its third section empowered the new company to make such settlements or adjustments with any of the stockholders of the old company, and to assume such debts, liabilities and claims of the same, as it might deem proper. Under this section the new company *subsequently* (*i. e.*, after the foreclosure,) arranged with the stockholders of the old to give them stock in the new. The case differs from *Railroad Co. v. Howard*, 7 Wallace 392.

In that case there was a preliminary agreement to sell the property and to make the foreclosure proceedings ancillary to such agreement, but after all this had been done and the property vested in the new company, the latter was found in possession of a fund equaling sixteen per cent of the purchase price, which sum it was about to pay over to the stockholders of the original company in pursuance of said agreement, and this amount was, of course, decided to belong to the creditors rather than to the stockholders of the old company.

### SECTION NINE.

**Hatcher v. The Toledo, Wabash & Western R. R. Co., 62 Ill. 477.**

**Purchaser at foreclosure is not liable for debts of original company, although it subsequently acquires its franchises.**

Action of debt by Hatcher against the Toledo, Wabash & Western Railroad Co. to recover on coupons issued by the Quincy & Toledo Railroad Company. Judgment for defendant. Affirmed.

The Quincy & Toledo Railroad Company executed its coupon bonds and deed of trust, and thereunder the road was sold

<sup>1</sup> It would have been interesting, and possibly of material influence upon the result, if the record had shown upon what consideration or for what reason the stockholders of the old corporation became stockholders in the reorganization "without purchasing any new stock." It is certainly a singular proceeding for the new corporation to take to its bosom (on equal terms with its own

stockholders) the stockholders of the former corporation, without money and without price, by an arrangement made *subsequently* to the foreclosure. Citations for the appellant: *Railroad Co. v. Howard*, 7 Wall. 392; *Mumma v. The Potomac Co.*, 8 Peters 281; *Curran v. State of Arkansas*, 15 Howard 304; *Minor v. Mechanics Bank*, 1 Peters 46.

in 1861; the purchasers organized as the Quincy & Toledo Railroad Company. The original charter did not confer the power to mortgage the franchise; but prior to the sale the legislature authorized the president to transfer the corporate franchise to the purchasers, which was done. The purchasers were also authorized to assume the name and privileges and franchises of the Quincy & Toledo Railroad Co.

After the sale, the general manager, who never had any connection with the old company, operated the road for the new company, Quincy & Toledo Railroad Company, formed by the purchasers. The old company ceased to exist so far as the old officers had anything to do with the management. The new company, by consolidation with another, effected in 1865, formed the defendant company.

The act of 1867 provides that in case of consolidation, the consolidated company is liable for all debts of each company which may enter into the arrangement.

This act is clearly not retrospective; it is designed to apply to consolidations to be effected after its passage.<sup>1</sup> It is a serious question whether the legislature has the constitutional power to enact retroactive laws.

The purchasers under the mortgage obtained a good title to the property clear of debts; and such sale has been held to effect also a transfer of the franchise.<sup>2</sup> But even if the franchise still remains to the original stockholders, it can not be sold for debt, except by legislative consent.<sup>3</sup> The acts of 1861, however, authorized the transfer of the franchise to the purchasers as fully as if originally granted; and this was a matter at that time purely between the company and the state, and not at all concerning third persons.<sup>4</sup> The legislature may give enlarged powers,<sup>5</sup> and mortgages of corporate franchises may

<sup>1</sup> Garrett v. Wiggins, 1 Scam. 385;    <sup>2</sup> Braffett v. Great Western R. R. Thompson v. Alexander, 11 Ill. 54; Co., 25 Ill. 453.

Marsh v. Chesnut, 14 Ill. 228.

<sup>4</sup> Am. Col. Society v. Wade, 7 S. &

<sup>3</sup> Allen v. Montgomery Railway, 11 M. 663; Arthur v. Com. Bank, 9 S. & Ala. 437; Mobile & Cedar Point Ry. M. 894.

v. Talman, 15 Ala. 472; Pollard v.    <sup>5</sup> 2 Redfield on Railways, 516, and Maddox, 28 Ala. 321; Bowman v. note.

Wathan, 2 McLean 393 (as to ferry franchise).

become valid by legislative ratification.<sup>1</sup> The state, by the act of 1861, assented to the sale of the franchise, and no other party can interfere.

### SECTION TEN.

**Houston & Texas Central R. R. Co. v. Shirley, 54 Texas 125.**

**Purchaser at foreclosure takes property free from unsecured debts, although subsequently thereto the mortgagor company is merged into such purchasing company.**

Suit for damages for breach of contract. Plaintiff contracted to build a railroad in 1870; the company broke its contract with him, and he brought suit against it, the Waco & Northwestern Railroad Company.

In 1871, the Houston & Texas Central Railroad Company undertook to finish the work, and did so, and received therefor the other company's bond, secured by deed of trust, being \$600,000, which matured in 1873, and not being paid, the deed was foreclosed, the Houston & Texas Central becoming the purchaser.

In 1873, the Houston & Texas Central "procured the passage of an act of the legislature of the State of Texas, by which, so far as the legislature could lawfully effect it, the said W. & N. R. Co. was merged into the said H. & T. C. R. Co., and thereafter constituted a part of the same, there being no provision made in said act of merger for the debts of the said W. & N. R. Co."

In 1876, plaintiff brought the Houston & Texas Central into the suit by amending his petition, and averring that all said acts between the companies were illegal, fraudulent and *ultra vires*; that no title passed; that the latter company acquired the property, "through said act of merger as aforesaid only, and by no other right or authority, and by virtue of

<sup>1</sup> 2 Redfield on Railways, 517, note; pay some of them (premiums of a Shaw v. Norfolk Co. R. R., 5 Gray, Fair). Texas Exposition v. Carruth-162; Richards v. Merrimack & Conn. ers, 29 S. W. R. 48; see also Menasha R. R., 44 N. H. 127. v. M. & N. R. R. Co., 52 Wis. 414; C.

The purchaser on foreclosure does & E. R. Co v. Towle (Ind.), 87 N. E. not become liable to the prior com- R. 858. pany debts, though it voluntarily

said act of merger and consolidation of said W. & N. R. Co. into said H. & T. C. R. Co., the latter is bound to pay your petitioner all his claims, demands and damages, with interest thereon, and his proper costs in this behalf expended, as hereinbefore set up, the same as said W. & N. R. Co. was bound and liable before said merger."

Plaintiff had judgment below, reversed on appeal and petition for rehearing overruled.

Ordinarily the consolidation of two railroad companies is accomplished by agreement under legislative authority; the terms of consolidation providing for the rights of both creditors and stockholders of the original corporations. A recent text writer says:<sup>1</sup> "The consolidated corporation, for the purpose of answering for the liabilities of the old corporations, is deemed the same as each of its constituents, and may be sued under its new name for their debts as if no change had been made in the name or organization of the original corporation." Evidently, a voluntary consolidation is intended. All the cases by him cited, show consolidation by agreement under legislative sanction; this can not be accomplished in disregard of the creditor's rights, and they are protected either by the statute or agreement; and even without that, the consolidated corporation is held to have assumed the liabilities of its constituents.<sup>2</sup>

But clearly, the purchaser of property at a sale under execution or deed of trust assumes no personal liability for the debts of the former owner; and if by such a purchase the chartered rights and corporate existence and privileges of a corporation pass under the contract of the purchaser, it still does not follow that its liabilities also attach to him.<sup>3</sup>

The statutes provide that a railroad corporation may incur by deed of trust its "road bed, track, franchise and chartered rights and privileges," and on sale thereof the purchasers shall be taken to be the "true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges and benefits thereof, in the same measure and to the same extent as if they were the original corporation of said company; and shall have power to construct, complete,

<sup>1</sup> Jones' Railroad Securities, Sec. 415.

<sup>2</sup> Pierce on Am. R. R. Law, p. 508, citing 1 Am. Rail. Cas. 96, notes.

<sup>3</sup> Vilas v. Milwaukee, etc., R. R. Co., 17 Wis. 518; Smith v. C. & N. W. R. Co., 18 Wis. 22; Morgan Co. v. Thomas, 76 Ill. 147.

equip and work the road upon the same terms and under the same conditions and restrictions as are imposed by their charter and the general laws of the state.”<sup>1</sup> It is also provided that the amounts due to the original company from former stockholders should not pass to the purchasers, but should vest in trustees for the benefit of the creditors of such original company, and that no suit pending for or against it should abate, but should continue “in the name of the trustees of the sold-out company.”<sup>2</sup>

Under these statutes, in a number of cases, individuals purchasing railroads have proceeded to organize and manage the corporation under the original charter.<sup>3</sup> The property, franchises, and the very corporate existence, pass to the purchasers. Ordinarily no further legislation is needed. But in this case the secured creditor, itself a railroad corporation, became the purchaser. The statute does not in terms provide for a purchase by another railroad or corporation; the powers of a corporation are strictly limited to those granted in their charters or by-laws. Hence, it was but a prudent precaution before operating the road, for the Central to obtain legislative sanction; and it would not reasonably, in such an act, burden itself with the debts of a company whose property it already held free therefrom; and consequently the act contains no stipulations whatever recognizing or protecting any rights in stockholders or creditors. No assent of the Waco & Northwestern Railroad Company is provided for. How could the legislature merge the Waco & N. W. R. R. Co. into the Central, regardless of the consent of the former and of the rights of the stockholders? Clearly, the legislature assumed that the purchase under the deed of trust had consummated all that the act undertook to do, provided only that the purchase by a corporation received legislative sanction. As to any property not included in the deed of trust the act was inoperative to effect any transfer without the assent of the first named corporation; but as to the property so included, the Central, being already the equitable owner, was by the act vested with full ownership, and empowered to operate the road under its own name and charter, and did not

<sup>1</sup> Pasch. Dig., Art. 4912; R. C. Art. 4260.

<sup>2</sup> Pasch. Dig. Arts. 4915, 4916, R. C. 4262-5.

<sup>3</sup> Galveston R. R. Co. v. Cowdrey, 11 Wall. 459-474.

thereby assume the liabilities of the other company either to its stockholders or creditors.

On motion for rehearing, it is urged that the statutes referred to, authorizing a railroad company to mortgage its franchise, were repealed by the constitution of 1866.<sup>1</sup> They have, however, been generally regarded as in force;<sup>2</sup> but whether those statutes are repealed or not is immaterial, for the power to mortgage its franchise has been otherwise sufficiently recognized by the state; the constitution says the franchise's corporate privilege shall not be sold under judgment except on foreclosure of mortgage or lien created by law.<sup>3</sup>

It is urged that the original contracts and trust sale and purchase were *ultra vires*; but though the Central had exceeded its powers, yet it was a consummated transaction, subject only to be impeached for that reason by the state; and when the act was passed, the Central was in possession of the property, and there is nothing to indicate that it was treated by the legislature as having acquired no rights thereby; it is impossible to suppose that the legislature could have passed the act had it deemed the purchase to be either fraudulent or *ultra vires*.

It is claimed that the Central owned nine-tenths of the stock of the Waco & N. R. R. Co., and that a majority of the latter's directors were also directors of the Central, and hence that the act of merger was passed upon the application of the Central, and that the same is equivalent to the assent of the other company. But the act was not passed in contemplation of any agreement fixing terms of consolidation. The remaining tenth of stockholders were not forced in, and could not be, neither were the land grants brought into the Central company; the act of merger can not be construed as attempting to vest the property of the Waco road into the Central. The sole purpose of the act was to give the state's assent to the purchase and operation of the road by the Central; the rights of the Waco company's creditors and stockholders were not affected; by accepting the act the Central did not subject himself to the lia-

<sup>1</sup> Art. 7, Sec. 6; Pasch. Dig., p. 943. etc., Co. v. Driscoll, 52 Tex. 17; R.

<sup>2</sup> Rev. Code, Art. 4259 *et seq.*; 2 R. Co. v. Henning, 52 Tex. 466.

Pasch. Dig., Arts. 7387-9; Scogin v. <sup>3</sup> Constitution of 1866, in same sentence which repeals the act of December, 1857.

Pac. R. R. Co., 48 Tex. 309; Tyler,



bilities of the Waco & N. W. R. R. Co. No question is before us as to the rights of a judgment creditor of the latter road. "We are not aware of having said anything which would preclude such a creditor from any remedy he may be entitled to, or embarrass him in seeking that remedy."<sup>1</sup>

## SECTION ELEVEN.

### Sundry instances.

Minority bondholders can not object to reorganization after foreclosure. They must accept their *pro rata* share, and can not insist on dividing a road and selling it piecemeal. The road in its entirety is a *quasi* public institution and must be kept in operation. *Gates v. Boston, etc., R. R. Co.*, 53 Conn. 333.

Under Canadian law, no constitutional prohibition existing there, the creditors of an embarrassed railroad corporation, may, by subsequent legislation, be compelled to allow their demands to be scaled down, and such provisions will be respected in the courts of the United States. The majority opinion likens it to "bankruptcy legislation." Mr. Justice Harlan writes an exhaustive dissenting opinion, declining to accord to a foreign statute more respect than would, under similar circumstances, be shown to a domestic one. *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527.

<sup>1</sup>Appellee's citations, among others, upon position that appellant accepted the liabilities of the Waco company: Act of Merger, May 24, 1878, Special Laws, p. 581; *Atkinson v. The Marietta & Cinn. R. R. Co.*, 15 Ohio St. 21-35; *Chicago R. R. Co. v. Moffitt*, 75 Ill. 528; *Thompson v. Abbot, etc.*, 61 Mo. 176; *Eldridge v. Smith*, 34 Vt. 490; *Waco Tap. R. R. Co. v. Shirley*, 45 Tex. 325; *Gordon v. Jones*, 27 Tex. 620; *Hays v. The H. & G. N. R. R. Co.*, 46 Tex. 280; *Graham v. Roder*, 5 Tex. 149; *The H. & G. N. R. R. Co. v. Randall*, Sup Ct., Texas Law Journal, November 22, 1878, No. 18, p. 278; 50 Tex. 254.

The franchise did not pass to the appellant by the sale. 50 Tex. 552;

2 Redfield Am. Ry. Cases, summary of editor, 690; 6 B. Mon. 1; Green's Brice's Ultra Vires, 802.

The merger was a valuable right; appellant, by accepting it, accepts the liabilities of the W. & N. W. R. R. Co., which by such transfer was deprived of its charter and of the power of further acquiring property for the use of its creditors.

The acceptance of the act of merger includes the liabilities of the Waco & N. W. R. R. Company. *Stephenson v. T. R. R. Co.*, 42 Tex. 162; Green's Brice's Ultra Vires, p. 545, par. III, IV, p. 538\* and p. 526, *et seq.*; *Indianapolis, Cin. & L. R. v. Jones*, 29 Ind. 465.

## CHAPTER XII.

## RIGHTS OF THE STOCKHOLDERS.

Upon the dissolution of a corporation all the stockholders become the owners of the property and none can be compelled to allow a fundamental change to be made in the enterprise, or to receive, for his interest, shares in a new organization; nor can this be overcome by legislative authority to make the substitution; such authority is only permissive.

The stockholder may, however, be estopped by his acquiescence, or compelled to make the substitution where the articles of incorporation, or the existing laws underlying them, had made provision for such contingency, or such steps had been decided upon before he became a stockholder, or were absolutely necessary and inevitable to pay debts.

Acquiescence, while estopping the stockholder from proceeding in equity to enjoin such reorganization, does not necessarily bar him from recovering at law the value of his interest which had been converted without his consent.

Upon consummation of consolidation the stockholders cease to be such in the constituent company and become stockholders in the consolidation; but this can be done only after the original company has been completely extinguished, for until then, it, the company, owns the stock of the new company, and, if need be, must use it in payment of its own debts before dividing the same among its own stockholders.

## SECTION ONE.

**Mason v. Pewabic Mining Company**, 133 U. S. 50; affirming 25 Fed. R. 882.

**After expiration of charter any stockholder may insist on sale of the property.**

The charter of a corporation having expired, it exists by law solely for the purpose of winding up its affairs. The majority

of the stockholders, no matter how large, can not compel the minority to give up their stock in the old corporation and to take stock in a new corporation which is being organized to succeed the old, nor can they compel them to take pay for their stock at an appraisement or valuation. The minority, no matter how small, can insist on the right of having all the corporate property reduced to cash and divided among the stockholders. The majority, no matter how great, has not the arbitrary right to place its own valuation on the stock, or to state what the equivalent thereof is to be in the new organization.

Following is the opinion in full:

“With regard to the main question, the power of the directors and of the majority of the corporation to sell all the assets and property of the Pewabic Mining Company to the new corporation under the existing circumstances of this case, we concur with the circuit court. It is earnestly argued that the majority of the stockholders—such a relatively large majority in interest—have a right to control in this matter, especially as the corporation exists for no other purpose but that of winding up its affairs, and that therefore the majority should control in determining what is for the interest of the whole, and as to the best manner of effecting this object. It is further said that in the present case the dissenting stockholders are not compelled to enter into a new corporation with a new set of corporators, but have their option, if they do not choose to do this, to receive the value of their stock in money.

It seems to us that there are two insurmountable objections to this view of the subject. The first of these is that the estimate of the value of the property which is to be transferred to the new corporation and the new set of stockholders is an arbitrary estimate made by this majority, and without any power on the part of the dissenting stockholders to take part, or to exercise any influence, in making this estimate. They are, therefore, reduced to the proposition that they must go into the new company, however much they may be convinced that it is not likely to be successful, or whatever other objections they may have to becoming members of that corporation, or they must receive for the property which they have in the old company a sum which is fixed by those who are buying them out. The injustice of this needs no comment. If this be

established as a principle to govern the winding up of dissolving corporations, it places any unhappy minority, as regards the interest which they have in such corporation, under the absolute control of a majority, who may themselves, as in this case, constitute the new company, and become the purchasers of all the assets of the old company at their own valuation.

The other objection is that there is no superior right in two or three men in the old company, who may hold a preponderance of the stock, to acquire an absolute control of the whole of it, in the way which may be to their interest, or which they may think to be for the interest of the whole. So far as any legal right is concerned, the minority of the stockholders has as much authority to say to the majority as the majority has to say to them, "We have formed a new company to conduct the business of this old corporation, and we have fixed the value of the shares of the old corporation. We propose to take the whole of it and pay you for your shares at that valuation, unless you come into the new corporation, taking shares in it in payment of your shares in the old one." When the proposition is thus presented, in the light of an offer made by a very small minority to a very large majority who object to it, the injustice of the proposition is readily seen; yet we know of no reason or authority why those holding a majority of the stock can place a value upon it at which a dissenting minority must sell or do something else which they think is against their interest, more than a minority can do.

We do not see that the rights of the parties in regard to the assets of this corporation differ from those of a partnership on its dissolution, and on that subject Lindley on Partnership says, Book 3, c. 10, § 6, sub-div. 4, page 555, original edition:

"In the absence of a special agreement to the contrary, the right of each partner on a dissolution is to have the partnership property converted into money by a *sale*, even though a sale may not be necessary to the payment of debts. This mode of ascertaining the value of the partnership effects is adopted by courts of equity, unless some other course can be followed consistently with the agreement between the partners; and even where the partners have provided that their shares shall be ascertained in some other way, still, if, owing to any circumstance, their agreement in this respect can not be carried out, or if their agreement does not extend to the event

which has in fact arisen, realization of the property by a sale is the only alternative which a court of equity can adopt."

The authorities cited by Lindley for this proposition amply support it.

In the case of *Crawshay v. Collins*, 15 Ves. 218, a commission of bankruptcy had been issued against Noble, one of the members of a partnership engaged in the business of manufacturing pumps and engines. The assignee of Noble filed a bill, asking for a division of the assets, which consisted largely of patents, and upon a very full argument upon the subject, Lord Eldon says: "Another mode of determination of a partnership is not by effluxion of time, but by the death of one partner." The question then is, he says, "whether the surviving partners, instead of settling the account and agreeing with the executor as to the terms upon which his beneficial interest in the stock is still to be continued, subject still to the possible loss, can take the whole property, do what they please, and compel the executor to take the calculated value. That can not be without contract for it with the testator. The executor has a right to have the value ascertained in the way in which it can best be ascertained—by sale."

In 17 Ves. 298, a case more analogous to the present one came before the court. In that case (*Featherstonhaugh v. Fenwick*) the parties were engaged as partners in the business of manufacturing glass, and after deciding one of the questions in the case, to wit, that the partnership was dissolved or should be dissolved by decree of the court, the master of the rolls, Sir William Grant, proceeded to say: "The next consideration is whether the terms upon which defendants proposed to adjust the partnership concern were those to which the plaintiff was bound to accede. The proposition was that a value should be set upon the partnership stock, and that they should take his proportion of it at that valuation, or that he should take away his share of the property from the premises. My opinion is clearly that these are not terms to which he is bound to accede. They had no more right to turn him out than he had to turn them out, upon those terms. Their rights were precisely equal: to have the whole concern wound up by a sale, and a division of the produce. As, therefore, they never proposed to him any terms which he was bound to accept, the consequence is that, continuing to trade with his stock, and at

his risk, they came under a liability for whatever profits might be produced by that stock." He then refers to the case of *Crawshay v. Collins*, just cited, with approval.

In the case of *Hale v. Hale*, 4 Beavan 369, Joseph Hale, who carried on the trade of a brewer in partnership with George Hale and two other persons, died leaving a will. The master of the rolls, in discussing the relative rights of the surviving partners and the executor of the deceased, says in regard to the executor: He "is not obliged to submit to the statement of the account which is made by the continuing partners; clearly not, in the absence of all contract to that effect, which is admitted to be the case here. He has a right to say, 'I must have the actual value of my partnership assets determined, and though it may be very inconvenient for you to ascertain the value in the mode prescribed by law, yet if we can not otherwise agree, I must have it ascertained by the only mode by which it can be ascertained accurately, namely, by a sale for what it will fetch in the market.'"

The next case, *Wilde v. Milne*, 26 Beavan, 504, was a case bearing a closer analogy to this, because its parties were engaged in the mining business, to wit, working a colliery. In consequence of some disagreements, the plaintiff gave notice to dissolve, and instituted this suit to have the partnership wound up. He did not allege that there were any debts, but prayed that the partnership property might be sold and applied to the payment of the debts, and that the surplus might be divided. This was resisted by defendant Milne alone. On the hearing, the master of the rolls, Sir John Romilly, said: "I am clearly of the opinion that this is an ordinary case of partnership, and when it is dissolved or terminated, any one of the partners is entitled to have the whole assets disposed of. In this case it is admitted that any one can put an end to the partnership. The result is, that that which forms the partnership assets must be disposed of for the purpose of settling the account between the partners. I consider this established by *Crawshay v. Maule*, 1 Swanston, 518, 526." And after pointing out the difficulty in the mode of dividing the property, which consisted partly of real estate, of the use of the shaft, of the machinery and engines, etc., he said: "The court is compelled by the exigency and circumstances of these cases to direct a sale."

The case of *Rowlands v. Evans*, and *Williams v. Rowlands*, 30 Beavan, 302, arose out of another partnership in mining business very much like the case before us. Some of the partners interested desired that the mining business might be carried on by a miner and receiver, but the plaintiff objected to this. One of the partners had become a lunatic, and his business was in the hands of a committee, and the question was whether the partnership be dissolved and the property sold, or a receiver appointed to conduct the operations of the concern. The master of the rolls said: "I do not think the point is touched by the decisions. The difficulty is this: the court can not compel persons to be in this situation—either to carry on business with the committee of a lunatic, subject to all the inconveniences of having a manager appointed by the court \* \* \* and subject to appeal to the House of Lords. \* \* \* No one would bid for a share in a mine to be carried on with a committee of a lunatic, nor could the value of the share of the lunatic be properly ascertained under such circumstances. I think that the value of the whole must be ascertained by a sale by auction, and that some indifferent person well acquainted with these matters, should be directed to sell the property, and that all parties should have liberty to bid."

In the case of *Burdon v. Barkus*, 4 De G., F. & J., 42, which came before the Lords Justices of Appeal from the Vice Chancellor's Court, Lord Justice Turner, delivering the opinion, said: "The next inquiry to be considered is the inquiry as to the valuation of the stock and plant, which is objected to on both sides by the defendant, as importing that the stock is to be valued; by the plaintiff, as importing that it might be valued as the stock of a growing concern. I think that both of these objections are well grounded. There was no agreement between these parties for the stock and plant being taken by either party at a valuation on the termination of the partnership, and in the absence of such an agreement a partner can not, as I conceive, be compelled to take, nor can he compel his copartner to take, the stock at a valuation. Each is entitled to have it ascertained by sale, and as to defendant's claim to have the stock dealt with as the stock of a growing concern, I do not see how it can be maintained, for the plaintiff is certainly not bound to continue the concern."

These English authorities would seem to be conclusive of



the right of the plaintiffs in the present case to have a sale of the property. The same doctrine is very decisively announced in the case of *Dickson v. Dickinson*, 29 Connecticut, 600. This was a bill in regard to a partnership, the main object of which was to procure the division of certain property which the plaintiffs claimed to belong to the partnership. The court said: "The plaintiff has no equitable claim to a decree in his favor. So far as the bill asks for the division of the property, we had supposed this object could only be effected by a sale of the property and a conversion of it into cash, and then dividing the cash, because as between partners there is no other mode, where they do not agree, of ascertaining the value of partnership property or of disposing of it."

The court then refers to the case of *Sigourney v. Munn*, 7 Connecticut 11, and cites the language of Judge Hosmer in that case, as follows: "In every case in which a court of equity interferes to wind up the concerns of a partnership, it directs the value of the stock to be ascertained in the way in which it can best be done, that is, by the conversion of it into money. Every party may insist that the joint stock shall be sold."

In the Supreme Court of Michigan, in *Godfrey v. White*, 43 Michigan 171, which is mainly important as showing the concurrence of the highest court of the state under whose laws the Pewabic Mining Company was organized, that court decided that certain lands which constituted a part of the partnership property should not be partitioned between the partners, but should be sold and the proceeds divided. See also *Briges v. Sperry*, 95 U. S. 401.

We do not say that there may not be circumstances presented to a court of chancery, in winding up a dissolved corporation and distributing its assets, that will justify a decree ascertaining their value, or the value of certain parts of them, and making a distribution to partners or shareholders on that basis; but this is not the general rule by which the property in such cases is disposed of in the absence of an agreement.

*We are of opinion that on the appeal of the defendants from this part of the decree, it must be affirmed.*

However honest the directors may be who conducted the business of this corporation for nearly a year after its dissolution without any attempt to wind it up, but who, on the contrary, assessed \$88,000 on the shares of the stock and collected

it, and did much other of the ordinary business of mining operations, it seems to us eminently proper that in this proceeding, by which the court undertook to wind up the affairs of the corporation, to pay its debts, and to realize its assets and distribute them among the shareholders, these directors should account for what they did in that time. We do not decide nor do we think it was necessary for the court below to have decided whether those directors had anything in their hands which should be accounted for in the final liquidation of the partnership affairs, or whether they had not. It is the object of such an inquiry as that sought by complainants in their bill to ascertain this fact. It was not a part of the matter referred to the commissioners in the former reference. We think it is a proper subject of investigation to be made by a master, to whom the matter should be referred, with express directions to ascertain and report upon that subject. See authorities already cited.

*That part of the decree, therefore, of the court, denying this relief, is reversed, and the case remanded to the court below with directions to appoint a master, and to direct such an inquiry and report.*

BRADLEY, J. I think the opinion of the court asserts too strongly the right of the minority stockholders to insist upon a sale. In many cases in this country, a valuation of the interest of a minority, under the direction of the court, has been deemed a proper method of ascertaining their share in the assets, where a sale would be prejudicial to the interests of the whole.

Mr. Justice Gray was not present at the argument, and took no part in the decision of this case.

## SECTION TWO.

**Botts v. Simpsonville & B. C. Turnpike Co., 88 Ky. 54; 10 S. W. 134.**

**There must be unanimous consent, although there is legislative permission.**

The consolidation of two turnpike companies, although authorized by legislation, can be effected only by unanimous consent of all their stockholders; a single stockholder can, by

injunction, prevent its consummation; neither the other stockholders nor the legislature have the power to change the contract under which he became a member or to compel him to take stock in a consolidated company—a different enterprise from the one to which he consented.

### SECTION THREE.

**Deposit Bank of Owensborough v. Barrett et al., 18 S.W. 837.**

**There must be unanimous consent, unless the articles provide otherwise.**

The O. & N. R. R. Co. was consolidated by act of the legislature with the T. & K. R. R. Co. One stockholder in the former company refused to consent, and the consolidation was held illegal as to such stockholder. "The consolidation was evidently illegal if done without the consent of all the stockholders, unless the original articles of association gave such a power to the majority.<sup>1</sup> The legislature could not compel the stockholder to go into a new and distinct corporation without his consent, as such action may, in many instances, materially affect the rights of parties in interest, and is in violation of the contract resulting from the original charter." But although such consolidation does not bind such stockholder, it does not necessarily follow that he can regain his interest in the specific property which was transferred to the new company as the result of the consolidation, as though it had been converted by the new company; having stood by for six or seven years and seen the property improving under new expenditures made under the new management, it would not be equitable to give him now a share in it, and hence such dissenting stockholder is limited in his recovery to the value of his stock in the former company at the time of the consolidation, with such profits and dividends as may have been declared upon it, or as the stockholders may have been entitled to.

<sup>1</sup> An instance of statutes and decisions, under which minority is bound to accept substituted stock on reorganization as arranged by the majority in accordance with subsisting power of amending articles, is found in *Hale v. Cheshire R. Co.* (Mass.), 87 N. E. R. 807.

## SECTION FOUR.

**Home Friendly Society v. Tyler**, 9 Pa. County Court Reports, 617.

**There must be unanimous consent; mutual benefit association.**

The Home Friendly Society, incorporated under the laws of Maryland, entered into a contract with the Temperance Mutual Benefit Association, incorporated under the laws of Pennsylvania, whereby the latter agreed to transfer to the former "the franchises, notes, accounts, vouchers, blanks, furniture, registers and every kind of property, of whatever name and nature," belonging to the association, and also the "control and management" of the association. The undisguised purpose was to merge the association in the society, the latter assuming all the former's debts and liabilities. Not all the members of the association agreed to this, and its organization was kept up the same as before the contract was made.

Tyler, a non-assenting member, had possession of all the tangible property embraced in the contract.

This is a bill by the society against Tyler and the association, to compel them to deliver the property in accordance with the terms of the contract. Demurrer to bill sustained and bill dismissed.

A mandatory injunction would be appropriate were the contract valid, but the contract is *ultra vires* and void; whether it be an attempt to amalgamate or consolidate the two corporations, in the absence of express legislative authority, the contract would seem to be absolutely *ultra vires*.<sup>1</sup>

Nor can the rule be here applied that a contract, having been fully performed by the one party, can not be assailed as *ultra vires* by the other.<sup>2</sup> Much "remains to be done besides merely handing over the property. Under the contract the association gets nothing in hand." Plaintiff is to pay the debts of the association and issue new certificates to such of its members as are willing to accept them; and for this it is asked that the entire property be handed over to the society, leaving the

<sup>1</sup> The court refers to a discussion *Lauman v. Lebanon R. R. Co.*, 80 "at length and with great intelli- Pa. 44.

gence," in Green's *Brice's Ultra Vires*, <sup>2</sup> *Oil Creek, etc., v. R. R. Pennsyl-* "under the proper heads." Also to *vania*, 83 Pa. 160.

non-assenting members unprovided for; besides, infants are allowed to be members of the association, and they, whether assenting or not, are entitled to be protected before it can be said that nothing remains to be done.\*

### SECTION FIVE.

**International & Great Northern R. R. Co. v. Bremond, 53 Texas 96.**

**Non-assenting stockholder held entitled to recover value of his interest, though estopped from enjoining.**

Suit by Bremond against the International & Great Northern Railroad Company, and the directors of the Houston & Great Northern Railroad Company, to recover the value of his stock, held by him in the latter company prior to its consolidation with another company, forming thereby the defend-

\*Defendant's citations upon the point that a contract for the assignment and sale of the franchises and other property of a corporation, is contrary to the policy of the law and not within the charter of the corporation: Morawetz on Private Corporations, §§ 39, 102, 536, 537; Green's Brice's *Ultra Vires*, pp. 104, 124, 305, 336n; Stewart & Foltz's *Ap.*, 56 Pa. 413; Wood v. Bedford R. R., 8 Phila. 94; Second Nat Bk. v. Gibbs Mfg. Co., 18 W. N. C. 174; Phila. v. W. U. T. Co., 2 W. N. C. 455; Susq. Canal Co. v. Bonham, 9 W. & S. 27; Pitts., etc., R. R. v. Bedford & B. R. R., 81 \* Pa. 104; Plymouth R. R. v. Colwell, 39 Pa. 337; 9 Railway and Corpn. Law Journal, 342.

The directors had no right to dispose of the company's property and franchises without the consent of all its members. Balliet v. Brown, 108 Pa. 546; Green's Brice's *Ultra Vires*, p. 79n; Morawetz on Priv. Corp., § 76 *et seq.*; Anderson v. Fidelity Storage Co., 26 W. N. C. 95; McCurdy v. Myers, 44 Pa. 535; Langolf v. Sieberlick, 2 Pars. 64; Bedford R. R. v. Bowser, 48 Pa. 29.

Citations for plaintiff: The entire

management is committed to the directors; their act is presumed authorized; want of authority shou'd be proved. Rider Life Raft Co. v. Roach, 67 N. Y. 378; 6 Am. & Eng. Ency. of Law, 782. Corporations, unless expressly restrained by statute, have an unlimited power of alienation, the same as individuals. 4 Am. & Eng. Ency. of Law, 219. A corporation may alienate any of its general property: Bank v. Mfg. Co., 2 Del. Co. 81; S. C., 18 W. N. C. 174; Boardman v. Watch Co., 8 Lanc. 25; Anderson v. Eltonhead, 26 W. N. C. 950. *Ultra vires* is not to be applied where the entire consideration has been received, and there is nothing immoral or opposed to public policy in the contract. DeGraff v. Am. Linen Thread Co., 21 N. Y. 128; Gould v. Oneoto, 3 Hun 406; S. C., 6 Thomp. & C. 646; Newburgh Petroleum Co. v. Weare, 27 Ohio 354; Atlantic City W. W. Co. v. Atlantic City, 39 N. J. Eq. 367; nor where party can not be put in *statu quo*. McCorkle v. Brown, 9 S. & M. 167; Voorhees v. De Meyer, 2 Barb. 37; Shaw v. Livermore, 2 Green 838.

ant company. Plaintiff had subscribed for \$100,000, on which he had paid forty per cent; he had judgment below for \$43,182.30. Reversed.

The opinion holds that the consolidation was unauthorized and wrongful as to Bremond, an objecting stockholder, and having been consummated "by a wrongful appropriation of his equitable interest by the consolidated company, that company became equitably liable to him therefor." The enterprise of the consolidated company so fundamentally differed as to termini and route from the original company that an original subscriber might well object that he had not agreed to such a union.<sup>1</sup> But he is not entitled to a personal judgment against the directors; they have done no wrong; been guilty of no conversion; have acted only for the stockholders and the companies, and have appropriated nothing to themselves personally.

Plaintiff is not estopped from recovering by reason of having known that the consolidation was being accomplished, and by having failed, for two years after it was effected, to take any steps in the matter. These are considerations which may prevent him from obtaining an injunction restraining the defendants from further proceeding in reference to the consolidation.

The mischievous effects of an injunction on the interest of the parties and others, evils which might have been avoided by an earlier application, have been regarded as precluding a party from that extraordinary relief,<sup>2</sup> though equitable relief similar to that sought has been granted;<sup>3</sup> but though thus precluded, yet plaintiff may follow up his equitable interest in the hands of a corporation, which, by appropriating it without authority, and by assuming the place and obligations of the Houston & G. N. R. Co., became equitably bound to compensate him therefor.<sup>4</sup>

Plaintiff's conduct has not been such as to preclude him

<sup>1</sup> Nugent v. Supervisors, 19 Wall. 52; Tash v. body v. Flint, 6 Allen 52; Tash v. 241; Angell & Ames on Corp., Sec. Adams, 10 Cush. 258.

391 *et seq.* and authorities cited.

<sup>2</sup> Clegg v. Edmonson, 8 De Gex.,

<sup>3</sup> Great West. R. R. Co. v. Oxford, Macn. & G. 787.

*etc.*, R. R. Co., 3 De Gex., Macn. & <sup>4</sup> Goodin v. C. & W. Canal Co., 18

G. 341; Graham v. Birkenhead, 2 Ohio St. 169; Chapman & Harkness

Macn. & G. 146; Hodgson v. Earl of v. Mad River, L. E., *etc.*, 6 Ohio St.

Poriso, 1 De Gex., Macn. & G. 6; Pea- 119.

from still refusing to go into the new enterprise, or demanding full compensation for his interest in the old, though estopped from further objecting to a consolidation which was attempted without authority; if illegal then, it has since been recognized by law, and for the purposes of this case is accomplished.

The enterprise in which plaintiff had embarked being at an end, he became entitled to his distributive share remaining after the payment of the debts, and may recover it from the consolidated company which took the place of and assumed the assets and liabilities of the original company.<sup>1</sup>

Appellants claim that the value of the stock should have been the market value, but as the stock was not fully paid, and no certificates issued, sales were too rare to give a market value; the inquiry should have been as to the actual value based on the condition of the assets and liabilities; defendant's evidence on these matters was erroneously excluded.<sup>2</sup>

<sup>1</sup> Lauman v. Lebanon R. Co., 80 Pa. 222; Taylor v. Miami Exporting Co., St. 42; Black v. Delaware, ec., R. 5 Ohio 168. Co., 9 C. E. Green 465.

<sup>2</sup> The briefs of counsel, covering some twelve pages of the report, are very instructive; they abound in citations and embrace the following, among other, topics: Action for misconduct of directors must be in corporate name, and not in name of stockholder, unless corporation refuses to prosecute; plaintiff can not, in one action, recover against the corporation on a cause for which it alone is responsible, and at the same time, by showing that its assets have all been converted by the directors, compel them to apply the proceeds to the payment of his judgment; the only cause of action which dissenting stockholders have upon an *ultra vires* act is in equity, and to compel restitution to the corporation, and not to themselves, citing on this point Dodge v. Woolsey, 18 How. (U. S.) 342; Solomon v. Laing, 12 Beav. 339; Kean v. Johnson, 1 Stockton 407; Goodin v. Cincinnati, etc., Canal Co., 18 Ohio St. 169; Abbot v. Amer. H. R. Co., 33 Barb. 578; Jackson v. Ludeling, 21 Wall. 624; Robinson v. Smith, 8 Paige

The general power given to the Houston Tap Company to consolidate with any other railroad company conferred an implied power upon every railroad corporation which might subsequently be created in Texas to consolidate with the Houston Tap Company even though the charter of the other corporation contained no clause authorizing it to consolidate, citing on this point Tomlinson v. Jessup, 15 Wall. 454; Schenectady, etc., P. R. Co. v. Thatcher, 11 N. Y. 102; Buffalo, etc., v. Dudley, 14 N. Y. 336, 348; White v. Syracuse, etc., R. Co., 14 Barb. 559; Suydam v. Moore, 8 Barb. 258; Inland Fisheries v. Holyoke Co., 104 Mass. 446; State v. Maine, etc., R. Co., 66 Me. 488; Pacific R. Co. v. Renshaw, 18 Mo. 210.

Plaintiff should have protested earnestly and distinctly, otherwise he is bound by the act of the majority. Watts' Appeal, 78 Pa. St. 370, 394. He has the burden to prove his dissent and protest. North Carolina R. Co. v. Leach, 4 Jones' Law 340; Martin v. Pensacola R. Co., 8 Fla. 370.

If the consolidation was illegal,



## SECTION SIX.

**Mowrey v. Indianapolis & Cincinnati R. R. Co., 4 Biss. 78 (District of Indiana).**

**Consolidation; there must be unanimous consent; principles reviewed; precedents distinguished.**

Bill by Mowrey to enjoin the proposed consolidation of the Indianapolis & Cincinnati Railroad Company with the Lafay-

plaintiff's sole remedy was to have it so declared and to have the property transferred back to the corporation to which it belonged, *i. e.*, the one in which he was stockholder. *Hays v. Ottawa R. Co.*, 61 Ill. 422; *Central P. R. Co. v. Clemens*, 16 Mo. 359, 366; *Ottawa R. Co. v. Black*, 79 Ill. 262, 268; *Mississippi R. Co. v. Cross*, 20 Ark. 443, 452; *Danbury, etc., R. Co. v. Wilson*, 23 Conn. 435; *Ex parte Booker*, 18 Ark. 338; *Conn., etc., v. Bailey*, 24 Vt. 465, 476; *Mississippi R. Co. v. Gaster*, 24 Ark. 97. Plaintiff, personally, can not recover damages for an injury done to the corporation. *Greaves v. Gange*, 69 N. Y. 154; *Robinson v. Smith*, 3 Paige 222; *Smith v. Hurd*, 12 Metc. 371; *Allen v. Curtis*, 26 Conn. 456; *Craig v. Gregg*, 88 Pa. St. 19.

Appellee's brief is exhaustive in its citations upon the following propositions: the consolidation was *ultra vires*; originating with the directors, *ultra vires*, and incapable of ratification; no majority, however large, can take the property from the minority. The directors have the duty as trustees to preserve the assets for all of the stockholders; before doing so the majority must pay Bremond the value of his interest; actual fraud need not be shown; diverting the corporate property is a breach of trust, for which the dissenting stockholders have an action of conversion against all participants; the consolidation was unauthorized; even if the legislature authorized it by act of May 8,

1873, the defendant having subscribed and paid in 1870 on the original charter of 1866, the legislature itself could not change the fundamental purpose of the company without plaintiff's consent or paying him his interest; citing on this point *Field on Corporations*, §§ 428-431; 2 Redf. on Rail., § 221, note 12; 4th Ed., §§ 332-333, and § 252, note 5; *Lauman v. Lebanon Valley Bank*, 30 Pa. St. 47; *Bailey v. State*, 16 Ind. 46; *Nashville R. R. Co. v. Jones*, 2 Cold. (Tenn.) 564; *New Orleans R. R. Co. v. Harris*, 27 Miss. 474; *Black v. Del. R. R. Co.*, 9 C. E. Green 466; *Chapman v. Mad. C. R. R. Co.*, 6 Ohio St. 137. The act of May 8, 1873, could be accepted only by unanimous consent. *Field on Corpn.*, p. 178, § 155; *N. O. & I. R. R. Co. v. Harris*, 27 Miss. 474.

In a recent case the Ohio statutes are construed and it is held that a stockholder who does not consent to a consolidation is entitled to have appraisement and payment of the value of his stock; and it makes no difference that he did not indicate his dissent before the agreement of consolidation was filed with the secretary of state; as to such claim the old company may be deemed in existence or the new company charged with its payment. *Pittsburgh, C. & St. L. Ry. Co. v. Garrett* (Ohio) 84 N. E. 493; citing § 3384 Rev. St.; *Compton v. Ry. Co.*, 45 Ohio St. 592; 16 N. E. R. 110; 18 N. E. R. 380.

ette & Indianapolis Railroad Company. Injunction granted upon condition that complainant file a bond in the sum of \$100,000.

Complainant owns \$331,550 of the capital of the former road. The proposed consolidation has been consented to by the latter company, and is about to be by the former; by it the consolidated company will issue \$2,800,000 in bonds, of which \$2,500,000 are to be delivered to Reynolds in trust, to pay all the expenses, to pay all the legal liabilities of the latter company for their stock, and third to pay such stockholders of the former company as desire to exchange their stock for these bonds.

It makes no difference whether the consolidation, if effected, will be beneficial or injurious to complainant; that is a question to be decided by the stockholders alone, and not by the court, provided they have the power so to do; hence the only question is, have the corporations the power to consolidate against the will of one of the stockholders. The statute gives the power in general terms, without any provision as to the consent of the stockholders,<sup>1</sup> hence whether, even under this statute, such consolidation can be effected against complainant's dissent, must be determined by the general principles of law.

The consolidation would work a material and fundamental change in the corporation in which he holds his stock; it would extinguish it, and also the other, and would form a new corporation, distinct from both the old ones, out of which it was formed; this is well settled.<sup>2</sup> The law is clearly laid down as follows:

As a general rule the act of the majority is binding on the whole, when confined to its ordinary transactions and consistent with the original objects of its formation.<sup>3</sup>

Where, at the time of subscribing, there are existing laws by which the charter may be fundamentally changed, such subscription must be presumed made in view of such possibility

<sup>1</sup> G. & H., 526.

17 Barbour 581, 604; 1 Kyd on Corporations, 422; Angell & Ames on

<sup>2</sup> The State v. Bailey, 16 Indiana 46.

<sup>3</sup> Troy & Rutland R. R. Co. v. Kerr, Corporations, pp. 53 and 396 (2d Ed).

of change occurring, and the majority may control the minority and make the change.<sup>1</sup>

Otherwise no fundamental change can be made, even though authorized by subsequent legislation; the national constitution prohibits the states from making laws impairing the obligations of contracts.<sup>2</sup>

These propositions are recognized in *Clearwater v. Meredith*.<sup>3</sup> The statement in another case<sup>4</sup> that the single stockholder has no right to object, rests on no authority, and is on unsatisfactory reasoning and singularly inconsistent with the judgment in the case, which was that the complainant could not be compelled to become a stockholder against his will in the consolidated company, and that the consolidation should be enjoined till he was secured in the payment of the value of his stock. "Why enjoin the consolidation at all if he had no right to object to it?" There is a dictum<sup>5</sup> to the effect that objecting stockholders may withdraw their shares and may enjoin till they are secured. But is it not a violation of his contract to force him either to sell his stock, or to enter the new company? There is a well considered case<sup>6</sup> which expressly decides that any stockholder in a railroad corporation may have an injunction to prohibit any fundamental change in the original purpose, though the proposed change be authorized by an act of the legislature. And in Indiana, in agreement with this, it is well settled that the consolidation without the subscriber's consent releases him.<sup>7</sup> These cases are on the just view that the relation between the stockholder and corporation is that of contract and can not be changed without his consent, nor impaired even by act of legislature.

<sup>1</sup> *Bish v. Johnson*, 21 Indiana 299. delivered the opinion of the court, On this point examine also *Hart v. Ogdensburgh, etc., Co.*, 23 N. Y. Supp. 639. Consolidation can be effected, though such privileges as voting for directors or the determination of net earnings were provided for; these would not be lost; the old corporation could be kept in existence, and the property kept account of for these purposes.

<sup>2</sup> *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 42.

<sup>3</sup> *The State v. Bailey*, 16 Indiana 46.

<sup>4</sup> *Stevens v. The Rutland & Burlington R. R. Co.*, 29 Vt. 545.

<sup>5</sup> *Sparrow v. The Evansville & Crawfordville R. R. Co.*, 7 Indiana 369; *McCray v. The Junction R. R. Co.*, 9 Ind. 358.

<sup>6</sup> *Redfield on the Law of Railways*, 575, 576.

<sup>7</sup> 1 Wall. 25; Mr. Justice Davis, who

It is argued also that the charter itself contains a clause reserving to the legislature the right "to alter or amend" it; but the consolidation would destroy it, and it is doubtful whether this is embraced in the right to alter or amend. Moreover, no amendment has been made, and hence the complainant's rights are the same as if said reservation had not been made. Neither has the general railroad law and its amendment (1853), authorizing consolidation, ever become part of the charter in question (passed long prior thereto) either by acceptance of the stockholders or otherwise.

It is also urged that the complainant consented to the consolidation. He was a director, and present at a board meeting at which it was considered favorably, reported by committees, and unanimously by the board recommended to the stockholders.<sup>1</sup> He should be considered as consenting to what was done.

But this does not estop him from now objecting. Those proceedings were only preliminary; the decision must come now from the stockholders; the articles themselves recite that the consolidation should be effected "by and with the assent of the stockholders." Complainant has a right to vote as a stockholder differently from what he did as a director;<sup>2</sup> he may have become better informed; or have otherwise changed his mind. There remained to him the *locus pœnitentiæ*; there was nothing fraudulent, deceitful or injurious in his conduct. He could change his mind just as a bidder at an auction may do before the property is struck off to him.

#### SECTION SEVEN.

**Small v. Minn. Electro M. Co., 45 Minn. 264; 47 N. W. 797.**

**Minority may prevent transfer of entire property for a term of years on a percentage of profits.**

An objecting stockholder of a manufacturing corporation can, by injunction, prevent the transfer of all of the corporate property and business to another corporation for a term of

<sup>1</sup> Glymont v. Toller (Md.) 30 Atl. Rep. 651, presents an instance of an estoppel upon a stockholder; he having acquiesced in a plan of reorganization, must take the new stock.  
<sup>2</sup> A director opposing a resolution

twenty-five years, the second corporation to pay all the debts of the first, and also during that period to pay to the first a certain percentage on the business. The court presumes that no such power would be in the articles of incorporation, saying that if it is, the defendants should have proved it. It would be an unusual power to transfer the business of one company to another, in the selection of the officers and managers of which latter company the stockholders of the former would have no voice.

The surrender of the property and the functions of a corporation in order that, while it is still to continue in existence, its business is to be carried on by another corporation, to which such transfer is made, would violate the rights of a non-assenting stockholder arising from the contract, implied if not expressed, in the creation of such an organization.'

#### SECTION EIGHT.

**Shaw v. Campbell Turnpike R. Co. (Ky.), 15 S. W. 245.**

**Minority may prevent purchase of another road with stock of their own corporation.**

A corporation acting through its board of directors, has no right to buy the road of another and pay for same with its own capital stock, although authorized so to do by an act of the legislature, as against the objection of even a single stockholder, who shows that his dividends would be diminished by such a combination; inasmuch as his corporation is running at a profit and the other one at a loss.

and finding himself in a minority, N. J. Eq. 456; Zabriskie v. Railroad, insisted on insertion of certain terms, 18 N. J. Eq. 178; Abbot v. Rubber believing that such insertion would Co., 83 Barb. 578; Middlesex R. Co. prevent the plan of the majority from v. Boston & C. R. Co., 115 Mass. 347. being carried out; *held* that he was not In another suit between the same responsible on the plan being carried parties, 10 N. Y. Sup. 456, injunction is refused because defendants out on those terms. In re Direct., deny that they are about to do the etc., R. R. Co., 81 Eng. L. & Eq. 430. complainant and the corporation

<sup>1</sup> Citing Stewart v. Transportation Co., 17 Minn. 372, 398 (Gil. 348); Cook, Stocks, §§ 667, 668; 1 Mor. Priv. Cor., being non-residents, relief should be §§ 413, 416; Block v. Canal Co., 24 asked in Minnesota.

## SECTION NINE.

**Memphis & C. R. Co. v. Wood, 88 Ala. 680; 7 Southern 108.**

**Minority may prevent control over their company by rival company owning a majority of former's stock.**

One railroad company owned the majority of the stock of another company; both had substantially the same field of operation. A stockholder of the latter company was allowed an injunction restraining the voting of such majority of stock. The theory upon which the injunction was granted and sustained was that the public interests are best served by the rivalry between railroads and by preventing competing roads from coming under the same management, and that the interests of the minority stockholders require that their road be protected from coming under the management of the other road, which would further its own interests to the prejudice of their road.<sup>1</sup> The fact that the statutes allowed one company to aid another by subscriptions to its stock, or to consolidate with it, was held to make no difference, as the case was not either one of these.

<sup>1</sup> This case is exhaustively reasoned and cites, among others, the following: As to the power of corporations: Wilks v. Railway Co., 79 Ala. 180; 8 Brick Dig. 159. Difference between buying property as an investment and buying for the purpose of collecting a doubtful debt: Bank v. Bank, 92 U. S. 122; 1 Mor. Priv. Corp., § 431. As to right to invest in shares of another corporation: 1 Mor. Priv. Cor., § 431; 4 Am. & Eng. Cyc. Law, 249, note 2; Railroad Co. v. Collins, 40 Ga. 582; Hazlehurst v. Railroad Co., 48 Ga. 13; Milbank v. Railroad Co., 64 How. Pr. 20; Franklin Co. v. Institution, 68 Me. 43; Sumner v. Marcy, 3 Wood. & M. 105; Bank v. Agency Co., 24 Conn. 159. Priv. Cor., § 517, § 528, *et seq.*; State v. Railroad Corporation, 13 Am. & Eng. R. Cas. 94; Pearson v. Same, Id. 102, and numerous authorities cited; Marsh v. Whitmore, 21 Wall. 178; 1 Mor. Priv. Cor., § 530, and note 3; Cook, Stocks, §§ 614 615; Nathan v. Tompkins, 82 A. a. 437; 2 Southern Reporter, 747; Railway Co. v. Magnay, 25 Beav. 586.

Although ordinarily only the former owner can question the right of the later owner to vote the stock (Moses v. Scott, 84 Ala. 608, and Southern Rep. 742), yet persons standing in a fiduciary capacity can be restrained at the instance of any one concerned, from acting contrary to the interests of the property in their hands. Thompson v. Lee, 81 Ala. 292; Moses v. Micon, 79 Ala. 564; Huguenin v. Baseley, 14 Ves. v. Railroad Co., 54 N. Y. 328; Mor. 273.

## SECTION TEN.

**Lauman v. The Lebanon Valley R. R. Co., 80 Pa. St. 42.**

**Minority can not prevent consolidation, but can insist on being paid the value of their shares rather than to receive the new stock.**

Bill for an injunction by Lauman, a stockholder of the Lebanon Valley Railroad Company, brought against that company to prevent its merger in and consolidation with the Philadelphia & Reading Railroad Company, under legislative authority. Granted.

Neither company could enter into such a contract without legislative authority. Either company, as a private corporation, may abandon its charter and dissolve itself, except as to its creditors' rights, and as to its duties as conservator of the highway, and as to this the legislature may release it, and allow a transfer of its duties to other hands. An association of individuals becomes a corporation when, by authority of law, it acquires a name by which its legal identity is preserved through all changes of membership and all other changes. Such a name is essential to corporate existence, and when it is given up the corporation ceases to exist.

Result of the proposed consolidation will be to extend and to enlarge the Reading company, but to merge into it and deprive of its name, identity and corporate existence, the Lebanon company. All the Lebanon's members will become members of the Reading company; all the former's property will vest in and all its liabilities be chargeable against the latter. Such a merger is dissolution, destroying the actual identity of both while the legal identity of one of them is preserved. "As where a life estate is merged in a fee simple, one being destroyed and the other enlarged by the operation."

A single stockholder can not object because the contract between the government and corporation is violated, for both consent; he can not prevent his corporation dissolving itself, for its members could bring this about by a voluntarily produced inability to proceed. But he can object when his associates place him in a different contract and for different objects and purposes from those to which he agreed; not even the legislature can do this; he can object that having con-



sented to become a member of the Lebanon company he should not be compelled to become a member of the Reading company; still he can not prevent the majority of his fellow members from taking the property of his unprofitable corporation and embarking it in a more hopeful enterprise; were this otherwise, then one member would, under some circumstances, have an almost absolute power over the investment of all the others. The property is a railroad and is indivisible; the only distribution on dissolution, however brought about, is to sell and divide the proceeds, or let some members take the whole on paying the others the value of their shares. The right of the minority is not violated by the sale of the whole property; this is often done by mortgaging, which involves power of sale. The legislature made no provision for non-assenting stockholders; it deemed the new stock equivalent to the old and supposed it would be accepted by all.

To compel a sale of property as by partition and compel each owner to receive his share of the proceeds is not unconstitutional; and hence to sell an entire railroad even against the consent of some stockholder is legal, even though it lead to dissolution; for dissolution is not prohibited. But the act of dissolution, like the act of association, is not a corporate act, but is the act of the members themselves; hence they can not settle the terms of the dissolution nor decide that the plaintiff shall take Reading stock for his interest, nor what he shall take for his interest. The act of transfer and dissolution is one, and if carried into effect destroys the plaintiff's stock, hence can not be allowed until security is given him. Let the injunction be issued on plaintiff giving security to the amount of \$1,000 to the defendant, and let it be dissolved on defendant giving security to the plaintiff in double the market value of his stock, to pay for said stock when its value shall be ascertained.<sup>1</sup>

<sup>1</sup> Complainant's citations: Redfield on Railways, 621; Pierce Am. R. R. Law, 85; 29 Law Times Rep., 187-9. Complainant can not be compelled to assume the liabilities of a stockholder in the other company. Act 2d, February, 1850, Pamph. L. 37. Defendant's citations that every corporation may surrender its charter: Erie, etc., v. Casey, 2 Casey, 287; McKenzie v. Sligo, 14 Eng. L. & Eq. 37; Grant on Corporations, 36.

## SECTION ELEVEN.

**Armant v. New Orleans & C. R. Co., 7 So. 85; 41 La. Ann. 1020.**

**Stockholders not bound by new charter until they consent thereto**

Stockholders are not bound by the provisions of the charter of the new corporation until they have consented thereto, either expressly or impliedly, and even then they are not in all cases bound by provisions which would tend to forfeit their vested rights. Dividends under the old corporation had accrued to a stockholder and he had allowed them to stand many years without calling for them. The company had then been reorganized and a new one formed of the same name, stock in which was issued to the stockholders of the old one in lieu of their former holdings. Dividends had also accrued on this new stock and been allowed to stand. Upon suit for all these dividends it was held, first, that the general statute of limitations was inapplicable, as the period would commence only from demand, and no demand had been made, except the one on which the suit was based. The defendant also contended that the provision in its charter, which declares that any dividend not called for in three years shall revert to the company, barred the action. But this was held no bar as to the dividends accruing before the reorganization, for the old charter did not contain such a provision, and the defendant had no power to insert it in the new one as against any stockholder objecting thereto; the new company had no power to destroy, abridge or forfeit rights acquired by the stockholders of the old without their consent. Finally, as to the dividends accruing with the new company, it is said that demand for them would be barred in three years as claimed, and that the provision to that effect is binding upon the stockholders of the old company who consented to the merging of their stock into the stock of the new company, from the time of such consent; and that by bringing the action for the dividends accruing with the new company, the plaintiff must be deemed to have given his consent, and that from that time on he would be bound by all the valid provisions of the new charter. But it is also held that as it fully appeared that plaintiff was ignorant of the exist-

ence of his rights and of all the proceedings had until shortly before the institution of the suit, that his consent should not be deemed to retroact in such manner as to operate a forfeiture of rights of the existence of which he was ignorant.

#### SECTION TWELVE.

**Ridgway Township v. Griswold, 1 McCrary C. C. 151.**

**After consolidation, complainant ceased to be stockholder in the old company, and can not bring bill as such.**

Bill in federal court in Kansas.

Plaintiff township had subscribed \$25,000 to the stock of the Lawrence & Carbondale Railroad Company, which thereafter was consolidated with another company under the authority of the Kansas statutes, with assent of two-thirds of the stockholders. The consolidated company executed mortgages on the property under which foreclosures were had; the defendants bought the property, and it being unsuccessful and valueless as a railroad, they are about to tear it up and sell the iron and other removable material. Plaintiff seeks to enjoin their doing so; injunction granted, but later dissolved.

Opinion by DILLON, C. J., FOSTER, D. J., concurring.

Plaintiff's position is that no legal consolidation had been effected; its original corporation is still *in esse* and plaintiff still a stockholder therein, the mortgages void, and defendant deriving no title thereunder so far as concerns that company's property.

The evidence, however, proves a consolidation was effected, that the mortgages are valid, and title passed by the foreclosure sale.

The consolidation of two railway companies extinguishes, unless otherwise provided, the two constituent companies and makes of them one new company.<sup>1</sup> The plaintiff township would, on consolidation being perfected, become a stockholder in the new company, and the new company would, unless otherwise provided, succeed to the duties as well as to the rights of the constituent companies. Plaintiff's bill is on the theory that it is a stockholder in the *old* company, and is wholly de-

<sup>1</sup> Clearwater v. Meredith, 1 Wall. 25; Tomlinson v. Branch, 15 Wall. 460.

fective; it is also fatally defective in not making the railroad company in which plaintiff alleges it is a stockholder, a party defendant.<sup>1</sup>

### SECTION THIRTEEN.

**Branch Sons & Co. v. The Atlantic & Gulf R. R. Co., 3 Woods 481.**

**Whether complainant would be barred by his acquiescence need not be considered; the mortgage is found valid.**

Foreclosure in federal court, Georgia.

The Atlantic & Gulf Railroad Company bought the road of the South Georgia & Florida Railroad Company, issuing its preferred stock in payment for the same, and thereafter mortgaged its entire property. Upon a foreclosure of their mortgage, Branch and others, holders of some of said preferred stock, filed their petitions claiming priority over so much of the mortgaged property as had been purchased. Petition denied.

Opinion by BRADLEY, Circuit Justice. The Atlantic & Gulf Railroad Company was constituted by the consolidation<sup>2</sup> of two prior companies, and took all the immunities, franchises and privileges granted to both companies by their original charters, which enabled it "to have, purchase, possess, enjoy and retain lands, rents, hereditaments, tenements, goods, chattels and effects, of whatsoever kind, nature or quality the same may be, and the same to sell, grant, demise, alien or dispose of;" this enabled it to purchase or construct a road within the limits of the original charter, hence to make the purchase it did.

The South Georgia & Florida Railroad Company had the power to make the sale; it had power at any time to purchase or sell its road, and the still higher power to incorporate its stock with the stock of any other company, on such terms as might be mutually agreed upon; hence, as the greater includes the less, it certainly had power to make the contract transferring its road and receiving preferred stock in payment, the transfer including all the franchises necessary to run and operate the road.

The Atlantic & Gulf Railroad Company having thus legally

<sup>1</sup> Davenport v. Dows, 18 Wall. 526. <sup>2</sup> Act of 1863, April 18.

purchased the property, had the power to borrow money, for that is implied in the creation of all business corporations, and had also such express power under the charter, and had also the power to mortgage its road and the franchise therewith connected and necessary to run and operate the same, not including the franchise of being a corporation. "If it had the power to sell, it had the power to mortgage, which is the lesser power, and included therein. This is an old doctrine and has been confirmed by the decision of the Supreme Court of Georgia."<sup>1</sup>

It is unnecessary to consider the position of the petitioners in which they were placed by their own conduct in taking the stock, receiving interest thereon for long years and generally acquiescing in the whole transaction; the petition is clearly without equity, and is denied.

#### SECTION FOURTEEN.

**Hollins v. St. Paul M. & M. Co., 9 N. Y. Supp. 909.**

**Complainant can not object to a transfer decided upon before he bought his stock.**

The stockholders of one company at the annual meeting, more than three-fourths being present, voted unanimously to transfer all its assets to another company; they also thereafter subscribed to the stock of the other company. Plaintiff was not a stockholder at the time of said meeting, but thereafter bought stock from some who were present and voted for said transfer; he then brought suit to restrain such transfer, alleging it to be *ultra vires*. It was decided that inasmuch as there was nothing *per se* illegal or prohibited by law in this transfer, and as it would be inequitable and oppressive to prevent the stockholders from carrying out what they deemed to be for their best interest, and as plaintiff stood in the shoes of those from whom he had bought, he could not ask for relief in equity. A stockholder holding a small interest must show a clear legal right to, and the necessity for, an injunction. The property is mostly situated in Minnesota and the courts of that state should be invoked, though the New York courts could interfere, if necessary.

<sup>1</sup> Wayne v. Middleton, 2 Kelley 883.

## SECTION FIFTEEN.

**Manufactures Sav. Bank v. O'Reilly, 97 Mo. 38; 10 S. W. 865.**

**Stockholder can not object to sale and to receiving payment in obligations of his company when necessary so to do.**

An iron company became insolvent and the directors thereof sold its furnace to a new company by the same name, which was organized for the express purpose of buying the property of the old company; the defendants were stockholders and officers in the new as well as in the old company "so that in effect, the sale was one by themselves to themselves." The plaintiff alleged that the old company was solvent, that the sale was needlessly made, and at too low a price, and alleged that thereby his stock in the old company was rendered worthless. As a fact, it was found that the old company was insolvent and that the sale was upon a sufficient price, although the property was taken, not for money, but in payment of the obligations of the old company. The directors may make a voluntary assignment without consent of the stockholders,<sup>1</sup> and it is also their duty to pay the company's debts and they may use its property for such purpose, though it disables the company from carrying on its business, if they act in good faith.<sup>2</sup> While directors can not represent the corporation and themselves in the same transaction, yet such sale as in this case is not absolutely void.<sup>3</sup> They may, however, be made to account to the old corporation for all profits by them made by the use of the corporate property.<sup>4</sup> If the property was sold for less than its value, the defendants should account for the difference; this suit is brought only for that purpose, and not to avoid the sale. The above rule as to the right and duty of the directors to pay the debts with the corporate property<sup>5</sup> is

<sup>1</sup> *Hutchinson v. Green*, 91 Mo. 367; 1 S. W. R. 853. that the directors may, especially when sustained by a large majority

<sup>2</sup> 1 *Mor. Priv. Corp.* (2d Ed.), § 513. of the stockholders, sell all the corpo-

<sup>3</sup> *Kitchen v. Railroad Co.* 69 Mo. 224. rate property when necessary in order to pay debts; no fraud nor violation

<sup>4</sup> *Ward Co. v. Davidson*, 89 Mo. 440; 1 S. W. R. 846; *Packet Co. v. Davidson*, 85 Mo. 467; 8 S. W. R. 545. of by-laws being shown. The result does not dissolve the corporation, it continues for the purposes of man-

<sup>5</sup> In *Sewell v. East Cape May Beach Co.*,—N. J.—, 25 *Atlantic* 929, it is held

aging the proceeds of the sale.

especially here applicable, for the old corporation was never more than a mere shell; it started in with an actual capital of only \$1,800 and a debt of \$139,000, which it assumed when taking the plant from its own predecessor, hence its own stock never had any intrinsic value.

### SECTION SIXTEEN.

**Treadwell et al. v. Salisbury Man'f'g Co. et al., 7 Gray 393.**

**Majority may, when necessary, sell entire property and take payment in stock of new company.**

Bill in equity by the executors of Thomas Cordis' will against Salisbury Manufacturing Company and others, alleging that they are the owners of forty shares of stock of the defendant, engaged in manufacturing wool, machinery, cotton, linen and iron. Another corporation was formed named Salisbury Mills, and composed mainly, if not entirely, of persons who were at the same time, and still are, officers and stockholders of the first named corporation; all the directors of the first company were stockholders in the second, and all but one, directors in the second company.

The stockholders voted, but against protest of the minority, and against protest of one of the plaintiffs, authorizing the directors to sell all the property of the first company at public or private sale, and if to a new company, to make provision giving to the stockholders in the first company the right to take an interest in the new one in proportion to their respective interests in the first company, and in case of any sale to close the affairs of the company. The bill alleged said votes to be illegal and void, that the directors were about to sell to the new company at too low a price, and to take stock of the new company in payment.

Bill alleged that the directors were in a fiduciary capacity, and were practically selling to themselves, etc., contrary to the rules of equity, and that such sale would be void. Plaintiffs also averred that it was uncertain whether they had power under said will to invest funds in the stock of said new company.

The court holds that the only jurisdiction in equity in the



bill is the prayer by the trustees and executors under the will for protection and advice; the court having none, in so far as concerned the allegations as to unlawful votes and contemplated unlawful acts beyond the scope of the corporate powers, as to which it was so well settled as not to admit of question, that chancery has no peculiar jurisdiction over corporations to restrain them in the exercise of their powers or control their action, or prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief. The common law in most cases furnishes ample remedies for excess or abuse of corporate powers or privileges; it is only where there is no plain and adequate remedy at law, and a case is presented which comes under some general head of chancery jurisdiction that a bill can be maintained against a corporation; and this rule is applicable to stockholders as well as to other persons.<sup>1</sup>

Neither is there jurisdiction in equity to advise the plaintiffs in this case; it is not as if there were conflicting claimants and the trustees would bring them into court and ask advice as to which to recognize. To issue orders in this case binding upon the plaintiffs and upon the several directors and other defendants would be the same as making a court of chancery control the corporation and all its acts and proceedings; the court has no jurisdiction over the defendants for any such purpose; indeed, none is claimed, excepting as the matters arise incidentally under the jurisdiction invoked by the plaintiff that the court should instruct them in the discharge of their duties, and that the acts if done will diminish the value of the trust estate. But this can not be carried so far as to control the defendants, for if it be, it would follow that there would be jurisdiction at the instance of a stockholder, who is an executor or other trustee, and none at the instance of other stockholders. Jurisdiction can not be made to depend on the capacity in which a party asks relief; for if it be, nearly every case in which a trustee holds any property could be brought in equity. There might be jurisdiction if any fraud or breach of trust were alleged, but the case shows that the

<sup>1</sup>Citing Angell & Ames on Corp., Ch. 371; Verplanck v. Mercantile Ins. Sec. 812; Grant on Corp., 71, 271; Co., 1 Edw. Ch. 84; Atty. Genl. v. Morley v. Alston, 1 Phil. Ch. 790; Bank of Niagara, Hopk. 354; Hodges Atty. Genl. v. Utica Ins. Co., 2 Johns. v. N. E. S. Co., 1 R. I. 350.

defendants have acted honestly, with entire good faith, and with the single purpose to carry out the will of the majority of the stockholders.

These views dispose of the case; but furthermore it is said that there is no doubt of the right of a trading and manufacturing corporation, by a vote of the majority of the stockholders, to close out and wind up, if in the exercise of a sound discretion they deem it advisable. At common law such right of sale is absolute, and not limited by objects, circumstances or quantity.<sup>1</sup> This right is not taken away by the statute,<sup>2</sup> which is not restrictive, but only permissive, and intended to provide a mode for dissolution without resort to the legislature.

Of course corporations which, like railroads, obtain public advantages (*e. g.*, right of eminent domain) and assume public duties, also charitable corporations, in whose affairs the community, or some portion, has an interest, may perhaps be restrained from alienating their property. But in a mere trading or manufacturing association, no one has an interest except the stockholders, and it is often best that they be wound up when not able to make the enterprise profitable or safe.<sup>3</sup> The case cited *contra* is one in which it was not a trading corporation, nor embarrassed, and the majority was attempting to divert the corporate property to a different purpose, by turning it over to a new corporation.<sup>4</sup>

The vote of the majority under the circumstances justified the directors, when unable to proceed, to sell out and settle with their stockholders on terms most advantageous to them.<sup>5</sup> Such sale may be to a new corporation; it is authorized by the *cestuis que trust* (the old stockholders), and hence not illegal as being a sale by the directors to themselves; it is done fairly and not collusively, the new stock given to those who will accept it, or to be converted into money by those who do not desire to retain it; and being thus taken as a mode of payment for the property it can not be objected to by the minority.<sup>6</sup>

<sup>1</sup> Angell & Ames on Corp., § 127 et seq.; 2 Kent Com., 6th Ed. 280; Mayor v. Lawton, 1 Ves. & B. 226, 240, 244; Binney's Case, 2 Bland 142.

<sup>2</sup> C. 55, Statute 1852.

<sup>3</sup> Sargent v. Webster, 13 Met. 504.

<sup>4</sup> Ward v. Society of Attorneys, 1 Collyer 870.

<sup>5</sup> Sargent v. Webster, 13 Met. 504.

<sup>6</sup> Hodges v. New England Screw Co., 1 R. I. 347.

## SECTION SEVENTEEN.

**William Kohl et al. v. P. M. Lilienthal et al., 81 California 378.**

**Stockholders are not entitled to distributions among themselves of the new stock, until final and legal dissolution of the old company.**

**Distribution of the new stock among the members of the old corporations.**

Two mining companies transferred their property to a third, new, corporation and received the stock certificates thereof in payment for such property.

Thereupon some of the stockholders of one of the former companies bring suit asking that the stock thus obtained be divided among them; the court below so orders; but the supreme court, with two dissenting, holds that as the former company has not passed out of existence nor been dissolved, the new stock obtained in payment for its property belongs to it (the corporation), and not to the stockholders, and can not be divided among them until dissolution of the company, which can be done only under the method pointed out by the statute.

The commissioner's opinion, however, agrees with the decision below, and puts it on the basis that the understanding throughout was that the new stock was to be thus divided and, hence, opinion by

**THE COURT.** For the reasons given in the foregoing opinion the judgment and order are affirmed.<sup>1</sup>

<sup>1</sup> So ordered in 20 Pacific Reporter, *Bridge v. R. R. Co.*, 112 N. Y. 1; 19 401, but reversed 22 Pacific Reporter, N. E. R. 489; *Harkness v. Ry. Co.*, 689. 54 N. Y. Super. Ct., R. 175. Yet

The general rule is that the stockholders are to look to their own corporation and receive from it the stock which it has received from the new corporation, so laid down in *Anthony v. Mor. Priv. Corp.* (chapter on rights and remedies of stockholders); *Bev-* when the original corporations are dissolved and pass out of existence, the stockholders thereof have a demand for their stock directly upon the new corporation. *Anthony v. American Glucose Co.*, 21 N. Y. Supp. 667; affirmed, 41 N. E. R. 23.

## SECTION EIGHTEEN.

**White v. Wood, 13 N. Y. S. 631; 59 Hun 619.**

**Stockholder entitled to distribution can be compelled to take share in money. Reversed, 29 N. E. 835, holding him not at all entitled to distribution.**

The court will not always enforce the strict legal right of a stockholder. A reorganization scheme was agreed upon whereby trustees were to take the stock of the new company and divide it back among the bondholders of the old in proportion to the amount of bonds each held. They departed without plaintiff's consent from this agreement and issued a greater amount of stock, and sold a portion of it for \$56,800, taking a note in payment. Plaintiff had attempted to prevent this by injunction, but was too late. The court holds that plaintiff should not be denied relief simply because defendants, by their own wrong, had put appropriate relief out of their power, neither, on the other hand, should plaintiff be allowed to use the machinery of the law for the purpose of injury or blackmail, or for forcing defendants to an exorbitant settlement by reason of the advantageous position he happened to occupy. Hence, the court says, it would be unjust to plaintiff to turn him over to a suit at law to recover damages, yet his remedy is only to be found in money, as it is impossible to give him the proportionate interest contemplated at first. Therefore the court of its own motion estimates the value of the bonds which plaintiff was to have had, and declares that to be the measure of his recovery. Reversed in 29 N. E. 835, holding trustees justified in holding back portion of the new stock for completion of the road.

## SECTION NINETEEN.

**Bell et al. v. P. S. & N. E. R. R., — N. J. —; 10 Atl. Rep. 741.**

**Stockholders barred by laches; state only can inquire into validity of consolidation.**

A company formed by the consolidation of several other companies executed a mortgage upon the property derived from them. About five years afterward, and after foreclosure,

but before the sale under this mortgage, some of the stockholders of one of the constituent companies sought by bill to have the mortgage set aside, alleging among other things that the consolidation was void. Relief refused. The court says their five years delay in attacking the mortgage bars them from relief in equity, on the ground of *laches*, and that only the state can inquire into the validity of the formation of the consolidated company. The validity of the existence of a corporation can be questioned only in direct proceedings by the state.<sup>1</sup>

### SECTION TWENTY.

**Carey v. The Cincinnati & Chicago R. R. Co., 5 Iowa 357.**

**Organization illegal; cancellation of deed given for subscriptions.**

Complainant sold and conveyed his land in Iowa to the Cincinnati, New Castle & Michigan Railroad Company, incorporated in Indiana, receiving stock of said company in payment. He alleges in his bill that false representations inducing the sale were made; the bill alleges further that said company consolidated with another and these two thus formed the defendant company which claims thereby to have become the owner of the land in question; alleges also that the consolidation was unauthorized by law. The supreme court reverses the ruling of the court below which sustained a demurrer to the bill and dismissed it for want of equity. The supreme court says that the courts of Iowa can not inquire into the legality of the incorporation of the grantee company, as that depends upon the Indiana statute, which has not been sufficiently pleaded; hence, it can not say whether there had been false representations in this respect. But the allegation that the grantee never had any charter can be inquired into collaterally in Iowa; if it never had any existence there can be no direct proceeding to test that question; and so if professing such existence it acquires property, then, as it had no

<sup>1</sup> Citations in text: *Railway Co. v.* (W. Va.), 8 S. E. R. 227; *Stout v. Railway Co.*, 32 N. J. Eq. 755; *Owen Zulick* (N. J.), 7 Atl. R. 362; *Bone v. Whitaker*, 20 N. J. Eq. 122; *Ter-Canal Co.* (Pa.), 5 Atl. R. 751, and *hune v. Potts*, 47 N. J. L. 218; Ang. note; *Railroad Co. v. Putnam* (Kan.), & A. Corp., § 784. Citations in note: 12 Pac. Rep. 593; *Bradwell v. Merritt* 10 Atlantic 741; *Lumber Co. v. Ward* (Mo.), 1 S. W. R. 885, and note.

power to take, neither can it transfer, and the sufficiency of such transfer may be inquired into collaterally. So also there may be the inquiry whether it has ceased to exist; or that it has suffered acts which destroy it; in such case it is as fully and entirely dissolved as if declared so to be by the sentence of a competent court.

If, as a necessary consequence of certain acts it has ceased to have a corporate existence, any individual claiming injury therefrom or benefit resulting thereby may have his remedy without first instituting a proceeding and having it declared that its existence has ceased. The fact being that its existence has ceased, it becomes dissolved and may be so treated.<sup>1</sup> Hence, if, as stated in the bill, the original company has lost its identity and existence by becoming merged into the new organization, then it may be treated as at an end, for it is in no position to necessarily require a judicial inquiry to determine its existence; it is true that it may not and can not thus relieve itself, or, perhaps, the incorporators individually, from responsibility to those to whom it or they may be indebted, but it may, by the act, become so situated as to be estopped from claiming that it remains undissolved.<sup>2</sup> If, on the other hand, it has had an existence and suffered no act which *per se* works a dissolution, if the inquiry is as to irregularities in proceedings or failure to comply with terms of charter, or if it has not surrendered its franchises, then the courts of Iowa can not determine the matter either in a direct or collateral proceeding. In such cases a judgment of forfeiture must first be obtained in the state which granted the corporate powers.<sup>3</sup> The effect of the Indiana statutes as to consolidation and whether they have been complied with can not be determined until they are fully brought before the court; but if consolidation as charged could not take place or was not in fact consummated, then the original grantee company would be still in existence and would be a necessary party to the bill. Enough is shown in the bill to entitle to relief if true, and it should not have been dismissed.

<sup>1</sup> Philips v. Wickham, 1 Paige 595, and cases there cited; Briggs v. Peniman, 8 Cow. 387; Canal Co. v. Railroad Co., 4 Gill & Johns. 1.

<sup>2</sup> Slee v. Bloom, 19 Johns. 456; 2 Kyd on Corp., 467; King v. Passmore, 3 Term R. 244; 1 Rolle Abr. 514; 4 Com Dig. 273.

<sup>3</sup> Canal Co. v. Railroad Co., 1 Gill & Johns. 1; Angell & Ames on Corp., § 777; Trustees v. Hills, 6 Cowen 23; The People v. The Society, etc., 1 Paine 653. All matters of forfeiture are fully treated in Cook on Stock, etc. (8d edition).

## SECTION TWENTY-ONE.

## Sundry instances.

Upon the dissolution of a joint stock association (Wells, Fargo & Co.) the trustees can not compel the members to take stock in the successor corporation. The dissenting members are entitled to their share in money; the trustees are personally liable if they convert the property; a receiver should be appointed for the assets on hand. (All these questions are extensively discussed in the briefs.) *Frothingham v. Barney*, 6 Hun 366 (13 N. Y. S. C. R.).

Upon the consolidation of two joint stock companies the dissenting members are not entitled to an immediate sale and distribution, but only to security that the property will be there to answer their final judgments. *McVicker v. Rose*, 55 Barb. 347.

A member, though not notified of the meetings at which the action was taken, can not attack the sale by a printing company (which was unable to proceed) of all its property to a rival company, and taking pay for same in the latter's stock. *Sawyer v. Dubuque Printing Co.*, 77 Iowa 242; 42 N. W. 300.

Lease between water company and ice company held valid; complainants had opportunity to take the stock; they can not lie by till it grows valuable and then object. *Appeal of Shaaber*, — Pa. —; 17 Atl. 209.

Statutory power to lease may be exercised by the directors without the stockholders' concurrence. *Beveridge v. N. Y. El. R. Co.*, 112 N. Y. 1; 19 N. E. 489.

A subscriber when sued on his subscription can not plead in bar the consolidation of the company during the pendency of the suit. If it is a good plea at all it should be in abatement, *puis darrein continuance*, inasmuch as the cause of action does not die but passes to the new corporation. *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389, 394.

The subscriber is not released by the consolidation agreement, providing that the stock shall be canceled and new stock issued; this refers to the certificates and not to the subscriptions; the latter, as part of the property, debts due and rights of action of the constituent, vest in the consolidation. *Hamilton v. Clarion M. & P. R. Co.*, 144 Pa. St. 34; 23 Atl. 53.



A subscriber is not released by a consolidation which was contemplated in the original articles and allowed under a statute enacted subsequently to the subscriptions being made, although at the time of the subscription there was no such statute in force: *Hanna v. Cincinnati, etc., R. R. Co.*, 20 Ind. 30; nor by one to which he has expressly consented: *Fisher v. Evansville, etc., Ry. Co.*, 7 Ind. 407.

A material change in the corporate purpose, though with legislative consent, releases the subscriber; as, for instance, a railroad company buying \$200,000 of the stock of a steamboat company. *Hartford, etc., R. R. Co. v. Crosswell*, 5 Hill 383.

The charter not permitting a consolidation, the consent of the stockholders must be unanimous, although a statute, enacted subsequently to the charter, allows consolidation. Such statute is merely a concession on the part of the state. *Mills v. Central R. Co.*, 41 N. J. Eq. 1.

A railroad corporation may be enjoined from deviating from its purpose by purchasing another road. Exhaustive opinion and citations by master in chancery. *Kean v. Johnson*, 9 N. J. Eq. 401.

A purchaser of shares in the Standard Oil Trust can compel the trustees to recognize him as such, and register his shares, although he is avowedly hostile to the trust and to its purposes; his motives can not be inquired into. *Rice v. Rockefeller*, 134 N. Y. 174; 31 N. E. 906.

One corporation will be enjoined from voting the majority of stock held by it in another corporation, when the two have conflicting interests. *American R. & C. Co. v. Linn*, 93 Ala. 610; 7 So. 191; *Memphis & C. R. Co. v. Wood*, 88 Ala. 630; 7 So. 108.

A stockholder in two corporations can not enjoin the stockholders of one from voting to engage in a business which he may fear will prove detrimental to the other. If there is ground for suit at all, it must be by one company against the other. *Converse v. Hood*, 149 Mass. 471; 21 N. E. 878.

In cases in which a company should bring suit, but does not, a stockholder may, after unavailing demand on the directors, bring suit in his own name; and if the directors themselves are the alleged wrongdoers, he need not even make the demand. *Nathan v. Tompkins*, 82 Ala. 437; 2 Southern 747;

Rothwell v. Robinson, 39 Minn. 1; 38 N. W. 772; Davis v. Gemmell, 70 Md. 356; S. C., 17 Atlantic 259, with valuable note; see also Boyd v. Sims, 3 Pickle (Tenn.) 771; 11 S. W. 948; Alexander v. Slarcy, 81 Ga. 536; 8 S. E. 630; City of Chicago v. Cameron, 120 Ill. 447; 11 N. E. 899; Moyle v. Landers, 78 Cal. 99; 21 Pac. 1133.

Although a stockholder is estopped from assailing a lease to which he has consented, yet, if the corporation fails to resist an illegal lease, he may do so in its name; the estoppel is only as between him and the company. Memphis & C. R. Co. v. Grayson, 88 Ala. 572; 7 So. 122.

The subscriber is released by an amendment to charter changing the *termini*, although the charter allows a change in route. Snook v. Georgia Improvement Co., 83 Ga. 61; 9 S. E. 1104.

A single stockholder has a remedy by injunction in his own name against his corporation and the president and directors thereof to prevent them from buying another road, and paying for it with stock of his own, the result of which would be to diminish his dividends, as his corporation was running at a profit and the other not. Shaw v. Campbell Turnpike R. Co. (Ken.), 15 S. W. 245.

Holder of stock as collateral may enjoin transfer of company's property to another, on showing it is done to make his stock worthless. Kelly v. Mariposa, etc., Co., 4 Hun 632.

Delay in attacking reorganization may bar plaintiff from relief in equity, but he may still have a right to damages for conversion of his stock. Gresham v. I. C. S. B. (Tex.), 21 S. W. 556.<sup>1</sup>

<sup>1</sup> It has, however, been said that on restriction on the power of parliament to amend a charter. Heathcote v. Ry. Co., 2 Macb. & G. 100; McDonnell v. Canal Co. 3 Ir. Ch. 578. In this state, where the power is expressly reserved to the legislature by our constitution, the right should equally exist. The contract of the stockholders was made in view of our constitutional provision, which entered into and formed a part of the charter as effectually as did the statute under which the corporations were organized." Market St. Ry. Co. v. Hellman, (Cal.) 42 Pac. Rep. 225-Cas. No. 9891. In England there is 229.

## CHAPTER XIII.

## LIABILITIES OF THE ORIGINAL COMPANY.

Corporations owing duties to the public can not absolve themselves therefrom; they remain primarily liable as principals, although by lease or otherwise they intrust to others the partial or entire possession and management of their property such other company operating the same either alone or jointly with the former.

The original company remains liable when the statutes so provide; it may so remain in one jurisdiction though it have ceased to exist in another.

Corporations, even when permitted to transfer their property and franchises, as, for instance, leasing by legislative consent, are not thereby necessarily released from liability for acts done by the transferee; the liability may still remain so long as there be no express legislative exemption from the same.

## SECTION ONE.

**The York & Maryland L. R. R. Co. v. Winans, 17 Howard 80.**

**Original company liable for infringement of patent by company operating road jointly with it.**

The York & Maryland Line Railroad Company existed under a charter from Pennsylvania, and was authorized to construct a road from the town of York to the Maryland line; its stock was subscribed for by a Maryland corporation, and their joint capital was invested in a continuous railroad from York to Baltimore. The Maryland corporation manages the road, appoints officers and agents, furnishes the rolling stock. Both companies have the same president and secretary. The Maryland company selects the directors of the Pennsylvania company; the latter company, in order to comply with the Penn-

sylvania law, keeps up the form of an organization, keeps a majority of directors as citizens of Pennsylvania, and makes annual reports. The net profits are ascertained and one-third assigned to the Pennsylvania company, but no money passes. Plaintiff's patent had been used without his consent upon the cars of the road; he brought suit against the Pennsylvania corporation in the federal court in Pennsylvania, and recovered verdict and judgment, based upon the charge of the court to the jury, that the road on which the infraction occurred was held under a Pennsylvania charter to the defendant in that court; the transportation was carried on by the Maryland company; the profits of the infraction were nominally divided between the two; that on said facts the plaintiff is entitled to recover against the Pennsylvania company whether it be regarded as partners or as principal, or as agent of the Maryland corporation. The Pennsylvania company complains of this charge, asserting that the cars (on which the patent was used) were not by it built nor to it belonging, but were the exclusive property of the Maryland corporation; that the agreement to divide profits did not constitute partnership nor evince the relation of principal and agent.

The court, however, is of the contrary view.

Following is opinion of the court in full:

"The plaintiff is a corporation existing under a charter from the State of Pennsylvania, and authorized to construct a railroad from the town of York to the Maryland line. Its stock was subscribed for by the Baltimore and Susquehanna Railroad Company, a Maryland corporation, and their joint capital is vested in a continuous railroad from the city of Baltimore to York. The management of the road is committed to the Maryland company, which appoints the officers and agents upon it, and furnishes the rolling stock necessary for its operation. The president and secretary of the two companies are the same. The directors of the Pennsylvania corporation (plaintiff) are selected by the Maryland company, and are qualified by a transfer of one or more shares of its stock to them, shortly before an election, and which they return on vacating their office. This nominal organization is made necessary by the charter, which requires that a majority of the officers shall be citizens of Pennsylvania, and that annual reports of the condition and business of the company shall be rendered

to the legislature. To preserve appearances with the legislature, an annual statement is made.

In this, the gross receipts of the entire road for the year are ascertained, and the expenses deducted; and the balance is then divided, one-third being assigned to the plaintiff; but no money passes between the corporations. In these expense accounts, the salaries of officers, conductors and engineers, the cost of locomotives and fuel, of the repairs and insurance of cars, and the losses of business, enter as constituent items. It was admitted upon the trial of the cause, that a number of cars, made according to the specification of the patent of the defendant, had been used upon the road without his license, and for which he brought this suit. A verdict was rendered in his favor, and the judgment thereon is brought to this court, upon exceptions to the instructions of the circuit court to the jury.

The court charged the jury that the road on which the infraction was committed was held under a Pennsylvania charter to the defendant in that court; that the transportation was carried on by the Maryland corporation, and that the profits accruing from the use of the cars upon the road, that is, the profits of the infraction, are nominally divided between the two companies; that upon these facts the plaintiff is entitled to recover against the present defendants, whether they are to be regarded as partners, or as principal or agent of the Maryland corporation.

The plaintiff complains here of this charge, for that the cars employed were not built by, and did not belong to the company; that they were the exclusive property of the Maryland corporation; and that the agreement to divide the profits did not constitute a partnership, nor evince a relation of principal or agent to impose a liability. This conclusion implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers to control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for

their insufficiency provided, as a remuneration to the community for their grant. The corporation can not absolve itself from the performance of its obligations, without the consent of the legislature. *Beman v. Rufford*, 1 Simon (N. S.), 550; *Winch v. B. & L. Railway Company*, 13 L. & Eq. 506.

If, then, the case had terminated with the facts that the infringement of the defendant's patent had taken place by the acts of persons using the corporate name of the plaintiff, with the assent of the corporate authorities, their liability would have been fixed.

But the case before us is, that the motive power on the road partly belongs to the plaintiff; that the agents and officers employed are in its service and are paid by it; and that the cars are fitted and repaired at the common expense of the two corporations. It follows, therefore, that the plaintiff is a principal, co-operating with another corporation in the infliction of a wrong, and is directly responsible for the resulting damage.

Nor will the plea that the corporation has no independent nor responsible existence as regards the Maryland company, and that its display of a president and directors, of conductors, engineers and agents, of annual elections and annual statements, import only a formal and illusive representation before the legislature of Pennsylvania, or their constituents, of a compliance with the conditions of the charter, avail the plaintiff. It is certainly true that the law will strip a corporation or individual of every disguise, and enforce a responsibility according to the very right in despite of their artifices. And it is equally certain that, in favor of the right, it will hold them to maintain the truth of the representations to which the public has trusted, and estop them from using their simulation as a covering or defense. *Welland Canal Co. v. Hathaway*, 8 Wend. 480.

The Supreme Court of Pennsylvania, in *Peters v. Ryland*, 8 Harris 497, has announced principles decisive of this case.

The court held that the owner of a passenger car employed on a railroad belonging to the state, and the motive power and superintendence of which is furnished by the state, is responsible for the misconduct of the public agents. It says: "The case before them is *sui generis*; but it comes much nearer to that class of decisions in which it has been held that sev-

eral parties engaged in carrying over different portions of the same line of conveyance, each sharing in the profits of the whole route, and of course of each section of it, are all responsible for the faithful discharge of their duty, and liable to respond in damages for any injury which results from the negligence or unskillfulness of any of the proprietors and servants." 11 Wend. 571; 18 Ib. 175; 19 Ib. 534.

"The state, as well as the carrier, is paid for every passenger transported on this railroad, which shows their community of interest; and if there be a common liability, that of the state can not be enforced by action; and this circumstance does not diminish that of the carrier, because they have a common interest, and share the business of transportation; however, it is apparent that in holding the party before us to answer for the negligence of the state's agents, we do not punish one man for the misfeasance of another's servants."

The objection taken to the patent, that it is signed by "an acting commissioner of patents," and that the record contains no averment nor proof of his title to the office, is not tenable. The court will take notice judicially of the persons who, from time to time, presided over the patent office, whether permanently or transiently, and the production of their commission is not necessary to support their official acts. *Wilson v. Rousseau*, 4 How. 686.

The judgment of the circuit court is affirmed.

*Order.*

This cause came on to be heard, on the transcript of the record, from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed, with costs and interest until paid, at the same rate per annum that similar judgments bear in the State of Pennsylvania.

SECTION TWO.

**Gale v. Troy & Boston R. R. Co., 51 Hun (N. Y.) 470.**

**Constituent company liable at law upon its own bonds.**

Action at law to recover on bonds and coupons issued by the defendant, the Troy & Boston Railroad Company, which



after their issuance consolidated with another company under the name of the latter in accordance with the statute.<sup>1</sup> Judgment for plaintiff; affirmed.

It is contended that thereby all the property of both corporations vested in the new, that it would be unjust that creditors of the old companies should maintain actions by which nothing could be collected, and hence, that no action at law can be maintained against defendant for prior debts.

The statute provides that pending actions should not abate by reason of the consolidation; thus it is manifest that the right of action was not destroyed, for if it had been the pending action would have abated. The statute also provides that the rights of creditors shall remain unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same. It would be contrary to the statute to deprive the creditor of his action. The defendant urges that because it has no property it can not be sued on its debts. This is a new doctrine. It has been held at the general term by the majority that no action lies on these bonds against the consolidated company; hence if the defendant is correct, no action at law lies against any one in these cases, in which event the rights of creditors would be very decidedly impaired.

### SECTION THREE.

#### **Singleton v. Southwestern Railroad, 70 Ga. 464.**

##### **Unauthorized lease; lessor liable for injuries by lessee to passenger.**

Action for damages by a passenger against the Southwestern Railroad for injuries caused by having been put off its train; the court below held the defendant not liable because it had leased its road, cars and engines, and allowed the lessee company to operate the same in the name of the lessor company, and that if either company were liable it would be the lessee. This decision is reversed above. A corporation has only the powers conferred upon it by its charter, and those necessarily implied. Its grants are to be strictly construed, and its obligations, whether to state or individual, strictly performed. A railroad company can not, without special authority

<sup>1</sup> Chapter 917, Laws of 1869.

of statute, alienate its franchise or property acquired under the right of eminent domain, or essential to the performance of its duty to the public, whether by sale, mortgage or lease.<sup>1</sup> If it allow another company to operate the road, it is liable for any injury done, as though itself running the cars.<sup>2</sup> It can not be absolved from its obligations except by special authority and exemption.<sup>3</sup> Unless defendants would be held liable, they might put their roads into the hands of persons or corporations of no responsibility. The public can look only to that corporation to whom they have delegated this portion of the public service.<sup>4</sup> Although the defendant did have the consent of the legislature to lease its road, yet its original obligation under its charter to the public can only be discharged by a legislative enactment consenting to, and authorizing the lease, with an exemption granted to the lessor company.<sup>5</sup> Defendant had such consent, but not the exemption. Moreover, the lease itself expressly provides for the continuance of the defendant's organization, and it dealt with the plaintiff below in its own name in selling him the ticket, beyond which ticket he was not required to look.<sup>6</sup>

#### SECTION FOUR.

**International & G. N. R. Co. v. Underwood, 4 S. W. 216; 67 Texas 589.**

**Lessor liable for injury to passenger by lessee holding road under ninety-nine year lease.**

Defendant held liable for injury to passenger carried on its road, though the road was under a ninety-nine year lease to another company, and the lessee had in turn made a lease to still another company, which last company was operating the road

<sup>1</sup> 101 U. S. 71; 17 How. 30; 21 Id. 441; 4 Biss. 35; 10 Allen 448. <sup>5</sup> Redfield, Law of Railways, 616; Ohio & Mississippi Railroad Co. v.

<sup>2</sup> Macon & Augusta Railroad v. Dunbar, 20 Ill. 627. Mayes, 49 Ga. 355.

<sup>3</sup> Pierce Am. R. R. Law, 244; Pierce on Railroads, 288. <sup>6</sup> Railroad Co. v. Brown, 17 Wall. 450. Jones v. Georgia Southern R. R., 66 Ga. 558, is not in point. It holds

<sup>4</sup> 26 Vt. 721; 17 How. 39; 1 Sim. (N. S.) 550; 13 L. & E. 506; 17 Wall. 445; 10 Gray 103; 22 Ill. 109; 4 Cush. 400; 5 Wall. 104. that an employe of the lessee injured by his co-employe has no cause of action against lessor.

at the time of the accident. Without authority conferred by statute one company can not lease its road to another so as to absolve itself from its obligations to the public, and when without such authority it surrenders the control of its line to another, it becomes liable for the torts of the company operating it,<sup>1</sup> which are committed on its line.

### SECTION FIVE.

**Montgomery & West Point R. R. Co. v. Boring, 51 Ga. 582.**

**Original company remains liable in Georgia although it has surrendered its charter in Alabama.**

Plaintiff was injured in Alabama while a passenger of the defendant, the Montgomery and West Point Railroad Company. He sues the defendant in Georgia. Defendant introduced in evidence the acts of the State of Alabama, allowing defendant to surrender its charter and incorporating the Western Railroad Company in its place; this is done in order to prove that at the time of the injury there was no such corporation as the defendant in existence in Alabama. It is held, however, that in Georgia the defendant continues its existence by virtue of its charter for the purpose of being served with process, and that as the Western Railroad Company asserts the right to the said defendant's privileges, it must also incur the liabilities imposed by the act of the original company's incorporation, which in terms protected the rights and interests of the people of Georgia against said company and its successors.

### SECTION SIX.

**Railroad Company v. Brown, 17 Wall. 445.**

**Original company operating jointly with lessee and receiver is liable for injury to passenger.**

A company whose road is in the hands of a lessee is still liable for wrongs done to a passenger. It is the accepted doc-

<sup>1</sup> *Gulf C. & S. F. Ry. Co. v. Wheat*, 549, in which there was authority for and *Central & M. Ry. Co. v. Morris*, making the lease. See also *Pierce*, 3 S. W. Rep. 457; distinguishing *Mis- R. R.*, 283 and note 6. *souri Pac. Ry. Co. v. Watts*, 63 Texas

trine in this country that a railroad corporation can not escape the performance of any duty or obligation imposed by its charter or the general laws of the state, by a voluntary surrender of its road into the hands of a lessee. The operation of the road does not change the relations of the original company to the public. It is argued, however, that this rule does not apply where, as in this case, the road was not by a voluntary but by a compulsory proceeding put into the hands of a receiver. Decision on this point is not necessary. The road is found to be operated jointly by the receivers and the lessees, and to some extent by the original company itself; hence the latter is clearly liable.

#### SECTION SEVEN.

**International & G. N. R. Co. v. Eckford, 71 Texas 274; 8 S. W. R. 679.**

**Lessor is liable for lessee's negligence, injuring passenger.**

A corporation owning a road is liable for injuries occurring thereon to a passenger, although the road is in the possession of and operated by a lessee; <sup>1</sup> the lessor can not lease the right to use its road so as to absolve itself from its duties to the public without legislative authority.

#### SECTION EIGHT.

**Railroad Company v. Barron, 5 Wall. 90.**

**Owner company liable for injuries caused by other company running train on former's track.**

Suit against the Illinois Central Railroad Company for death of a passenger on its train, caused by an express train of the Michigan Central Railroad Company running with great speed from behind, into the train on which deceased was being carried. The defendant had granted or leased to the Michigan

<sup>1</sup> Cites and relies on Railroad Co. R. 797 and note; Palmer v. Ry. Co. v. Morris, 68 Texas 59; 3 S. W. R. (Idaho), 16 P. R. 553 and note; Har-457; other important cases and valuable notes on this point are found in 835 and note; Acker v. Ry. Co. (Va.), Nugent v. R. R. Corp. (Me.), 12 Atl. 5 S. E. R. 688.

Central the privilege of running their trains on this part of the road. The question is not whether the Michigan Central is responsible, but whether the defendants, by giving to that company the privilege of using its road, have thereby released themselves from responsibility. The question has been rightly settled in Illinois, holding the owner of the road liable,<sup>1</sup> and the same principle has been affirmed in other states.<sup>2</sup>

<sup>1</sup>The Chicago & St. Paul R. R. Co. v. McCarthy, 20 Ill. 385; Ohio, etc., R. R. Co. v. Dunbar, Id. 623; Chicago & Rock Island R. R. Co. v. Whipple, 22 Id. 105.

<sup>2</sup>Nelson v. The Vermont, etc., R. R. Co., 26 Vt. 717; McElroy v. Nashua, etc., R. R. Co., 4 Cushing 400.

In the absence of a statute permitting it, a railroad company can not evade its responsibility to the public, and it remains liable for injuries to persons, lawfully upon its tracks, injured by a train run by the lessee of such company. Galveston H. & S. A. Ry. Co. v. Garteiser (Tex.), 29 S. W. R. 939; citing R. R. Co. v. Morris, 68 Tex. 59; 3 S. W. R. 457; R. R. Co. v. Kuhn, 70 Tex. 582; 8 S. W. R. 484; R. R. Co. v. Eckford, 71 Tex. 274; 8 S. W. R. 679; R. R. Co. v. Lee, 71 Tex. 538; 9 S. W. R. 604.

This rule has not been held applicable to the running of a steamboat; the matter is not discussed; it is simply held that a steamboat run by a lessee, and in the lessee's exclusive control, places no liability upon the lessor when injury is done by it; the ordinary rule as given in Sherman & Redfield on Negligence, § 501, is applied, by which no liability comes upon the owner of property for its mismanagement by one to whom the

entire possession and control of it had been intrusted. Galzoni v. Tyler et al. (Cal.), 30 Pacific R. 981.

A railroad company leasing its road has been held liable for injuries (caused by defects in its road bed) to the lessee's employe. Galveston, etc., Co. v. Daniels (Tex.), 28 S. W. R. 548; citing Railway Co. v. Lane, 79 Tex. 643; 15 S. W. R. 477 and 16 S. W. R. 18; but not for negligent management by lessee of cars; Baxter v. N. Y., etc., Co. (Tex.), 22 S. W. R. 1002.

The lessor corporation as well as the lessee is liable, and it seems they may be sued jointly, for injury done by the lessor building its track so as to cut off ingress to plaintiff's property, and by the lessee subsequently making use of such tracks. Stickley v. Chesapeake & Ohio R. Co. (Ky.), 20 S. W. R. 261.

While the original corporation may remain liable for its torts even after consolidation, and the consolidation may also become liable for the same by reason of the liability being assumed (for which propositions see citations), yet this liability can not be enforced by a suit against them jointly. Langhorne v. Richmond Ry. Co. (Va.), 22 S. E. R. 159; reversing 19 S. E. R. 122.

## SECTION NINE.

**Rome & D. R. Co. v. Chasteen, 88 Ala. 591; 7 So. 94.**

**Lessor corporation liable for lessee's negligence when lease is unauthorized.**

A railroad company does not avoid responsibility for an injury caused by the negligence of the agents or servants of another corporation, or of a natural person to whom it may lease or voluntarily surrender its property and franchises without competent authority.<sup>1</sup>

## SECTION TEN.

**Ricketts v. Birmingham St. Ry. Co., 85 Ala. 600; 5 So. 353.**

**Original company liable for purchaser's negligence unless sale was authorized.**

Plaintiff was injured upon a street railway. He brought his suit against a company which was supposed to own the line, but which pleaded that it had sold the line to another company a month before the injury occurred. The court instructed the jury that plaintiff could not recover unless defendant was operating the line at the time of the injury. This instruction the supreme court holds erroneous, saying: Important franchises are conferred and duties imposed by the charter and general law upon the defendant as a street railway corporation, from which it can not absolve itself by a voluntary surrender without legislative consent of the whole of its property and franchises to another corporation; notwithstanding such transfer has been made, if it was without legislative authority, the defendant remained liable for injuries caused by the negligence of the servants or employes of the transferee, the same as though it itself was operating the road. In such cases both companies are responsible.

<sup>1</sup> See also *Durfee v. J. G. & K. H. R. Co.*, 24 N. Y. Supp. 1016; but is properly distinguishing the case of an employe from that of the public, as he can enter the service or leave it not liable for defects in the engine he alone just as he please, but the public belonging to the lessee, causing injury to lessee's employe; *B. & O. R. Co. v. Paul*, 40 N. E. R. 519, very must be carried.

## SECTION ELEVEN.

**Ricketts v. Chesapeake & Ohio Ry. Co., 83 W. Va. 488; 10 S. E. 801.**

**Liable for injuries to passenger carried on its road by another company without legislative consent.**

Defendant's road was, by its consent, operated by another company which had not complied with the statute in such manner as to authorize it so to do. Defendant continued to own a large part of the rolling stock in use, and to pay at least some of the officers and agents. Defendant was held liable for injuries to a passenger carried on its road by such other company. The principle upon which this is held is, that defendant has important franchises to enable it to provide for the public, and that its responsibility is the consideration which it gave for the grants made to it, and it can not absolve itself therefrom without legislative consent.

## SECTION TWELVE.

**Briscoe v. Southern Kan. Ry. Co., 40 Fed. 273.**

**Lease unauthorized, lessor liable for stock killed by lessee.**

A railroad chartered by the laws of Kansas and thereby authorized to lease its road, did lease it. A part of the road, however, was in the Indian Territory, and the road was there, as elsewhere, operated by the lessee, and in its operation killed the plaintiff's horses. The lessor company was held liable. The power to lease must be expressly conferred; the corporation receives its charter upon the condition that its franchises are to be exercised for the public good, and can not absolve itself from this obligation without legislative consent. The act of congress which allows its operation in the Indian Territory does not give such consent or authority. True, the laws of Kansas do give such authority, but they can have no extra territorial effect. A road chartered in one state is by comity allowed to carry on business in another, but is limited in such other state to the ordinary and usual powers which it exercises



in the state of its organization. The making of a ninety year lease is not within the ordinary powers of a railroad corporation.

### SECTION THIRTEEN.

**Harmon v. Columbia & G. R. Co., 28 S. C. 401; 5 S. E. 835.**

**Even when lease is authorized, lessor may be liable for stock killed by lessee.**

Even if a company has legislative consent to lease its road, it is not thereby released from liability for damage done to plaintiff's cattle by the lessee; at all events not where such lessor still maintains corporate organization and existence, and instead of running its road itself directly, has bargained with another company to run it for a compensation. In such case the lessor company still retains the benefit of its charter and can not escape its corresponding obligations. What would be the effect of an absolute transfer of all the chartered rights and privileges by a sale made under proper authority, is not involved in this case.<sup>1</sup>

### SECTION FOURTEEN.

**Virginia M. R. Co. v. Washington, 86 Va. 629; 10 S. E. 927.**

**Lease authorized, no express exemption from liability; conflicting authorities, but no liability to lessee's employe, caused by operation of the road.**

There is a conflict in the authorities as to the fact of exemption from liability where there is legislative authority to lease.

<sup>1</sup> A note in the report of this case Co. (Minn.), 10 N. W. R. 594; Lakin at 5 S. E. R. 837, cites, upon the proposition that corporations organized for public purposes can not, by lease or otherwise, disable themselves from carrying them out, unless by legislative consent. Railway Co. v. Morris (Tex.), 4 S. W. R. 156; Breslin v. Car Co. (Mass.), 13 N. E. R. 65; Naglee v. Railway Co. (Va.), 3 S. E. R. 369; Freeman v. Railway Co. (Minn.), 10 N. W. R. 594; Lakin v. Railroad Co. (Or.), 11 Pac. Rep. 68. A legislative exemption from future liability is necessary; a mere consent to lease will not suffice. Balsley v. Railroad Co. (Ill.), 8 N. E. R. 859. Lessor and lessee are both liable when stock is killed by lessee, and there was no statutory permission to make the lease. Railway Co. v. Dunham (Tex.), 4 S. W. R. 472.

Some hold that even in such case the lessor is not exempt from liability arising through lessee's negligence unless expressly exempted by the statute; others hold that no such express exemption is necessary. All these cases relate to injuries to non-employees, but no case has been found which makes the lessor liable for injury done to the lessee's employe while operating such leased road.<sup>1</sup>

The lease of a railroad under authority of law discharges the lessor from the lessee's torts.<sup>2</sup>

Yet the lessor has been held liable unless exempted in terms by the statute.<sup>3</sup>

It has been held that the remedy of a passenger is against the lessee with whom he has contracted, and not at all against the lessor.

#### SECTION FIFTEEN.

**Nugent v. Boston, C. & M. R. Co., 80 Maine 62; 12 Atlantic 797.**

**Owner company liable to lessee's employe for injury caused by negligent construction of station house.**

Defendant company allowed the Portland & Ogdensburg company to use part of its track, and leased its entire road to still another company, which had operated same for a long time, when one of the Portland's employes was injured by reason of the negligent construction of one of the station houses of defendant. It is held that he can recover against the defendant. The fact that there is a contract between the two roads makes no difference, except that it proves that plaintiff was lawfully present and was not a trespasser on the defendant's road. Although the defendant company assumed in express terms "all liability and risk of accident from a defect of road-bed, track or default of employes," nothing was thereby

<sup>1</sup> Since this was said there has appeared Logan v. N. C. R. Co. (N. C.), 21 S. E. R. 959, holding the lessor liable (unless specially exempted by statute) for injuries done the lessee's employe by lessee's mismanagement of trains. Ditchett v. Railroad Co., 67 N. Y. 425; 5 Hun 165; Norton v. Wiswall, 26 Barb. 618.

<sup>2</sup> Singleton v. Railroad Co., 70 Ga. 464; Patt. Ry. Acc. Law, §§ 130, 131.

<sup>3</sup> Banking Co. v. Friddell, 7 S. E. R. 214; Nugent v. R. R. Co., 80 Maine 62-72; 12 Atlantic Rep. 797.

<sup>4</sup> Pierce, R. R., 283 and note, citing Mahoney v. Railroad Co., 63 Me. 68;

added to the defendant's legal obligations; these terms did not express all which the law required of railroad companies as to the reasonable safety of its station houses.<sup>1</sup> The defendant, as compensation for its corporate franchise, intended in a large measure to be exercised for the public good, is under the duty to the public, independent of contract, to keep the road and its appurtenances in a reasonably, safe and proper condition.<sup>2</sup> The cause of action is for a tort, and there need be no privity between plaintiff and defendant.<sup>3</sup> These principles are sustained in a well considered case,<sup>4</sup> though there are some to the contrary.<sup>5</sup>

Hence, plaintiff had the lawful right, as brakeman of the Portland road, to pass and repass the station house, and defendant owed him the duty to so construct it that its awning should not injure him, and defendant is liable unless its leasing and consequent full possession of its road by the lessee, constitutes a defense. It is well settled law that a railroad company can not, without statutory authority, divest itself of, or relieve itself from any duty or liability imposed by its charter or the general laws of the state by leasing its road and appurtenances to another.<sup>6</sup> Assuming the lease duly authorized by the legislatures of the respective states which had granted the charters, yet the defendant is not released; it would not be free from liability caused by fires set by lessee's engines.<sup>7</sup> Lessor and lessee have been held liable for the injury under a like statute.<sup>8</sup> An authorization for the lease is not enough; there must also be an express exemption to the lessor; "grants to corporations, whether of powers or exemptions, are to be strictly pursued, and their obligations are to be strictly performed whether they

<sup>1</sup> Tobin v. Railroad Co., 59 Me. 183.

<sup>5</sup> Murch v. Railroad Corp., 29 N.

<sup>2</sup> Thomas v. Railroad, 101 U. S. 71, 83; Bean v. Railroad Co., 63 Me. 293, 295.

H. 35; Pierce v. Railroad Co., 51 N. H. 593; cited on another point in Mahoney v. Railroad Co., 63 Me. 72.

<sup>3</sup> Broom, Com. Law, 4th Ed., 655, 670, 673, 675, 676; Campbell v. Sugar Co., 62 Me. 552, 564.

<sup>6</sup> Railroad Co. v. Winans, 17 How. 30; Thomas v. Railroad, 101 U. S. 71, 83.

<sup>4</sup> Sawyer v. R. R. Co., 27 Vt. 370; re-examined and re-affirmed, Merrill v. Railroad Co., 54 Vt. 200; also in Smith v. Railroad Co., 19, 127; Snow v. Railroad Co., 8 Allen 441; Pierce R. R., 274; Patt. Ry. Acc. Law, Sec. 228; 2 Wood Ry. Law, 1338, 1339 and notes.

<sup>7</sup> Pratt v. Railroad Co., 42 Me. 579; Stearns v. Same, 46 Me. 95.

<sup>8</sup> Ingersoll v. Railroad Co., 8 Allen 438; Davis v. Railroad Co., 121 Mass. 134.

may be due to the state or to the individuals.”<sup>1</sup> A recent case,<sup>2</sup> reviewing the authorities, sustains this view, not simply on the narrow ground of the lessee exercising a franchise belonging to the lessor, but also because the corporation, in consideration of the grant of its charter, assumes duties to the public, from which public policy requires that they be not released without legislative consent, and there is no express exemption in the statute which authorized the lease. In a case in this state<sup>3</sup> it is held by a divided court that the lessee and not the lessor is liable for wrongful expulsion of a passenger by lessee's employe. The statute provided that “nothing contained therein shall exonerate the lessor from any duties or liabilities imposed upon it by the charter or by the general laws of the state.” But there is a difference between an injury caused by the sole wrong of the lessee, and one caused by the lessor's negligence in the original construction of the depot.

This is the true distinction: An authorized lease, without an exemption clause, absolves the lessor from injuries caused in the operation and management of the leased road over which the lessor could have no control; but for negligent omission of some duty owed to the public, such as the proper construction of road, station houses, etc., the charter company can not, in the absence of statutory exemption, discharge itself of legal responsibility.<sup>4</sup> The covenant in the lease to “save the lessor harmless,” etc., does not affect the plaintiff or the defendant's liability to him, but is simply a contract for reimbursement for such damages as may in anywise be recovered against it by plaintiff. Defendant is also liable under the rule which governs the responsibility of the lessor of demised premises for their condition, namely, that when premises are unsafe for the avowed purpose for which they are let, the lessor, whether in or out of possession, is responsible for injuries to persons lawfully upon them.<sup>5</sup>

<sup>1</sup> Singleton v. Railroad, 70 Ga. 464; 48 Am. Rep. 574; Nelson v. Railroad Co., 26 Vt. 717; 1 Redf. R. R. 590.

<sup>2</sup> Balsley v. Railroad Co. (Illinois), 8 N. E. R. 857; see also Pierce, R. R., 244.

<sup>3</sup> Mahoney v. Railroad Co., 63 Me. 68.

<sup>4</sup> Railway Co. v. Curl, 28 Kan. 622.

<sup>5</sup> The principal case cites and reviews many cases for and against this proposition.

The lessor has, however, been held not liable for injuries caused to lessee's employe for defects in structure of a railroad platform, where it ap-

## SECTION SIXTEEN.

**Chollette v. Omaha & R. V. R. Co., 26 Neb. 159; 41 N. W. 1103.**

**Lessor liable for injuries to passenger done by lessee though lease was authorized by legislature.**

A railroad company is liable for injuries to persons upon its road, although it may have leased the road to another company and has had legislative consent so to do. Consent alone does not suffice; there must also be granted by the legislature an exemption from liability in order to free the company. The facts do not show in what capacity the company operating the road had obtained it from the defendant, but the court assumes any and all capacities, such as lessee, or under contract, or as purchaser of the capital stock of the defendant; no matter how or on what arrangement the operator takes the road, and even with legislative consent, the original company is constantly liable, unless exempted by legislation.<sup>1</sup>

pears the employe could have there made a coupling safely with one car standing still; the proximate cause of his injury is the running of the train by his co-employees. *Evans v. Sabine, etc. Co. (Tex.)*, 18 S. W. R. 493. Nor liable for defective appliances: *Buckner v. R. & D. R. Co., (Miss.)* 18 So. R. 449.

<sup>1</sup> Citations in opinion: A railroad company is liable for injuries to passengers caused by the negligence of another company which it allows to use its road. *Pierce, R. R.*, 283, and cases there cited; *Balsley v. Railroad Co.*, 119 Ill. 68; 8 N. E. R. 859; *Singleton v. Railroad Co.*, 70 Ga. 464; *Railroad Co. v. Brown*, 17 Wall. 445; *Railroad Co. v. Mayes*, 49 Ga. 355; *Nelson v. R. R. Co.*, 26 Vt. 717; *R. R. Co. v. Dunbar*, 20 Ill. 623.

As to company carrying over another's line, *Railway Co. v. Blake*, 7 Hurl. & N. 987; *Birkett v. Ry. Co.*, 4 Hurl. & N. 729; *Buxton v. Ry. Co.*, L. R. 3 Q. B. 549; *Thomas v. Ry. Co.*, L. R. 6 Q. B. 266; *Stetler v. Ry. Co.*,

49 Wis. 609; 6 N. W. R. 803; *R. R. Co. v. Peyton*, 106 Ill. 534; *Bissell v. Railroad*, 22 N. Y. 258; *Peters v. Rylands*, 20 Pa. St. 497.

Following are distinguishable: *Hood v. R. R. Co.*, 22 Conn. 1; also the citations in 2 Ror. R. R. 997, and 2 Wood Ry. Law, 1417.

A valuable note to this case in Vol. 41 N. W. R. on page 1110, cites also, among others, *Railway Co. v. Morris (Tex.)*, 4 S. W. R. 156; *Navigation Co. v. Railway Co.*, 9 S. C. R. 409; *Breslin v. R. R. Co. (Mass.)*, 13 N. E. R. 65; *Naglee v. Railway Co. (Va.)*, 3 S. E. R. 369; *Freeman v. Ry. Co. (Minn.)*, 10 N. W. R. 594; *Lakin v. R. R. Co. (Or.)*, 11 Pac. R. 68; *Harmon v. R. R. Co. (S. C.)*, 5 S. E. R. 835; *Palmer v. R. R. Co. (Idaho)*, 16 Pac. R. 553; *Acker v. Railway Co. (Va.)*, 5 S. E. R. 688; *R. R. Co. v. Eckford (Tex.)*, 8 S. W. R. 679 and note; *R. R. Co. v. Lee (Tex.)*, 9 S. W. R. 604; *Nugent v. R. R. Co. (Me.)*, 12 Atl. R. 797; *Ry. Co. v. Dunham (Tex.)*, 4 S. W. R. 472.

## SECTION SEVENTEEN.

**Bower v. The Burlington & S. W. R. Co., 42 Iowa, 546.**

**Lessor liable for injury to lessee's passenger.**

A railroad company is liable to a passenger injured on its road, when the road is run in its own name, although in fact it is in the hands and control of a lessee. It can not escape its duties by voluntarily surrendering its road to a lessee. "The holder of a ticket contracts for carriage with the company, not with the lessee."<sup>1</sup>

## SECTION EIGHTEEN.

**The East St. Louis & Carondelet Ry. Co. v. Ulrich Gerber, 82 Ill. 632.**

**Owner held liable for mare killed on its road by another company permitted to use same.**

Action to recover for value of mare killed upon an unfenced railroad belonging to the East St. Louis & Carondelet Railway Co. Plaintiff's recovery sustained.

It appears that defendant owned the road and track, but permitted the Cairo & St. Louis Railroad Company to use one rail of the track in common with defendant, making with its own rail a narrow gauge for said company, defendant's track being ordinary gauge. Defendant asked an instruction, based on sufficient evidence, to the effect that it would not be liable if the mare was killed by a train of the Cairo & St. Louis company, and on the track by it used. Instruction held properly refused. The owner of the track has been held liable, though the animal was killed by the train of another company.<sup>2</sup> The theory is that the owner of the track owes the duty to the public of having it fenced; public safety requires that such owner be held liable for the neglect. So, also, the party using such track is liable, for presuming to use a fenceless and unprotected road. Either company is liable. The rule is the same, whether the whole track, or but one rail, be involved. The liability arises from defendant's neglect to fence its road. The negligence in this regard is the gist of the action.

<sup>1</sup> Railroad Company v. Brown, 17 Wall. 445.

<sup>2</sup> The Toledo, Peoria & Warsaw Ry. Co. v. Rumbold, 40 Ill. 143.

## SECTION NINETEEN.

**Toledo, etc., Railway Co. v. Rumbold, 40 Ill. 143.**

**Same topic.**

Defendant, Toledo, Peoria & Warsaw Railway Company held liable for cattle killed on its unfenced road by a train of the Illinois Central Railroad Company running thereon with defendant's permission; in this regard the "train and servants of the Illinois Central Railroad Company are the train and servants of the defendant." The gist of the action is in not fencing the road as the statute requires. Public policy requires that the public be protected. The negligence in this respect is chargeable to the owner. The company using the track is also liable for presuming to make use of an unfenced track. Either company is liable and it has been so held before.<sup>1</sup>

## SECTION TWENTY.

**Ditchett v. Spuyten Duyvil & P. M. R. R. Co., 67 N. Y. 425.**

**Lessor not liable to person using highway for injuries caused by lessee's neglect of fence.**

Defendant railroad company in constructing its road had made an excavation along the highway, but properly erected a fence between it and the highway, and thereafter leased its road to another company which took possession thereof and operated the same, but allowed the fence to become defective and broken, by reason of which a person traveling along the highway fell into the excavation and was killed. The defendant is held liable by the court below, but judgment reversed above.

It is well settled that an action for not repairing fences, by reason whereof another party is injured, can only be maintained against the occupier and not against the owner of the fee, who is not in possession.<sup>2</sup> Otherwise, however, if the de-

<sup>1</sup> Illinois Central Railroad Company R. 818; The Mayor, etc., v. Corlies, 2 v. Kanouse, 39 Ill. 272. Sandf. S. C. R. 301; Sands v. Edgar,

<sup>2</sup> Cheetham v. Hampson, 4 Term 59 N. Y. 28.



fect already exists and the premises are a nuisance at the time of the leasing.<sup>1</sup> The provisions of the general railroad act requiring the fencing of roads are inapplicable; they are intended for the protection of passengers, and cattle.<sup>2</sup> They have no application to persons traveling on the highway. Even if applicable in a proper case, it may well be doubted whether the lessor of a railroad, who had parted with possession, could be held liable for the negligence of the lessee under the statute in question.

### SECTION TWENTY-ONE.

**Brown v. Hannibal & St. J. Ry. Co., 27 Mo. App. 394.**

**Owner company liable for damages done by other company running train with owner's consent, and spilling salt on track.**

Action against Hannibal & St. Joe Railway Company for value of a horse killed by the train of another company which was passing over defendant's track. The horse had been attracted to the track by salt, which had been there spilled and allowed to remain. Judgment for plaintiff, affirmed.

There is no evidence of a lease, or by what right the other company's train was on defendant's track. A railroad company can not, by lease, without the consent of the state, escape responsibility for the acts of the lessee, and thus shift upon another the burdens and responsibilities it assumed when accepting its charter;<sup>3</sup> but with such consent it can;<sup>4</sup> the statute<sup>5</sup> gives such consent, but it is therein provided that the lessor shall be and remain liable for the acts of the lessee; hence it has been correctly held<sup>6</sup> that a lessor is not liable for the acts of the lessee except by virtue of the statute, and that when the lessor is sued for the acts of the lessee there should be some allegation as to the lease; but it has not been decided that the statute itself should be pleaded.

That decision, however, has no application to this case; it is

<sup>1</sup> Sands v. Edgar, 59 N. Y. 28.

<sup>2</sup> S. Laws of 1854, chap. 282.

<sup>3</sup> Freeman v. Railroad, 28 Minn. 68.

448; Nelson v. Railroad, 26 Vt. 717;

Thomas v. Railroad, 101 U. S. 71; The York, etc., v. Winans, 17 How. 30;

Black v. Canal Co., 22 N. J. Eq. 130.

<sup>4</sup> Freeman v. Railroad, 28 Minn.

448; Mahoney v. Railroad, 63 Maine

<sup>5</sup> Revised Statutes, 790.

<sup>6</sup> Maine v. Railroad, 18 Mo. App.

388.

defendant's own negligence which allowed the salt to remain on the track so as to attract stock, and it matters not whose train it was which killed the horse.

PHILLIPS, P. J., concurring, in a separate opinion disapproves of that portion of the opinion in *Maine v. Railroad*<sup>1</sup> which holds that the lessor can be held liable only under the statute;<sup>2</sup> the right to maintain such action was not conferred by said section;<sup>3</sup> it existed by virtue of the general statute respecting railroad corporations; the section authorizes the lease, but also continues the antecedent liability of the lessor, the same as if the section authorizing the lease had never been enacted. So that while the pleader might be required to aver the existence of the lease, he ought not to be required to plead the statute as conferring the right of action.

### SECTION TWENTY-TWO.

**National Bank v. Atlanta & Charlotte Air Line Ry. Co., 25 S. C. 216.**

**Owner company liable for failure of its lessee to deliver freight.**

Action by plaintiff against the defendant, Atlanta & Charlotte Air Line Railway Company, for damages for non-delivery of two lots of cotton, for which, when shipped, bills of lading were issued by the Chester & Lenoir Narrow Gauge Railroad Company; when the cotton reached Gastonia it was delivered to the defendant, and was then by the defendant's lessee, the Richmond & Danville Railroad Company, transported to Lowell, N. C., and there delivered to the wrong parties.

Defendant asked an instruction: "That the plaintiff can not recover if the jury find that the defendant was not operating the railroad at the time of the conversion;" held, properly refused.

A railroad or other corporation receives its charter on the consideration that it will perform the duties and fulfill the obligations which it at the same time incurs; if it see fit to perform these through another, whether as lessee or otherwise, this can

<sup>1</sup> 18 Mo. App. 390.

2, ch. 4, sect. 180, and authorities;

<sup>2</sup> Revised Statutes, 1879, sec. 790.

17 Wol. 445; *Speed v. Railroad*, 71

<sup>3</sup> On this appellee cites Patterson's

Mo. 303.

Railway Accident Law, p. 132, bk.

not release it from such obligations,<sup>1</sup> and there is no distinction in this respect between actions *ex delicto* and *ex contractu*; the foundation of the liability is that the company, by accepting its charter, has assumed obligations from which it can not absolve itself by leasing its road to another company; and as such company is not only under obligations to carry passengers safely, but also to deliver goods intrusted to it for transportation, the same principle would apply in either case. It appears, however, that defendant, by its own agent, and not its lessee, receipted for the cotton, and hence the contract was made directly with the defendant, though its road had been leased.

### SECTION TWENTY-THREE.

**Backus v. Detroit W. T. & J. Ry. Co.,** 71 Mich. 645; 40 N. W. 60.

**Lessors liable for additional servitude imposed on land by lessee.**

Two railroad companies condemn a right of way for the passing of trains over private property, and then lease the road to a third company, giving it full power and stating that it should build it as owner, which company then makes use of it not only for the passing of trains, but also for switching purposes, thus causing additional damage and detriment to the adjoining property. The land owner in a suit in trespass is held entitled to recover an additional compensation against the two lessor roads; it is said they can not so lease or transfer their interests under their franchises as to rid themselves of their liability to the plaintiff for their improper use of them. The agreement between the companies had the effect of consolidation as to the liability to third persons for unlawful use of the property by the lessees of defendants or other persons allowed by them.

<sup>1</sup> *Railroad Company v. Brown*, 17 Wall. 445; *Y. & M. L. R. Co. v. Winans*, 17 How. 30; *Abbott v. J. G. Co.*, 80 N. Y. 27; *S. C.*, 36 Am. Rep. 572. be sued in matters *ex contractu*, especially where there is a right to lease; the statute gave the right to "farm out" the road: 12 Stat. 440, § 4; 11 Stat. 848, § 13; and this includes

Defendant cites, among others, right to lease: 72 N. C. 637; 73 Id. Rorer, R. R., 604, 605, note 5, 606-609; 528. 10 Gray 104, that the lessee should

## SECTION TWENTY-FOUR.

**Aycock v. Raleigh & Augusta Air Line R. R., 89 N. C. 321.**

**Lessor liable for fire caused by lessee.**

Action for damages for injury to land by fire set from sparks from engine. The defendant company, leasing the use of its road or permitting its use by another company remains liable for the consequences of the mismanagement of the train in charge of the servant of the latter, and the injury thence resulting, to the same extent as if such mismanagement was the act or neglect of its own servants operating its own train.<sup>1</sup>

## SECTION TWENTY-FIVE.

**Naglee v. Alexandria & F. Ry. Co., 8 S. E. 369; 83 Va. 707.**

**Owner company liable for property destroyed by fire although road was in hands of trustees under deed of trust.**

Action against railroad company for trespass in destroying plaintiff's property by fire; court below held defendant not liable, because the road was at the time operated by trustees under a deed of trust. Supreme court reverses this decision. No proof was made that the road's surrender to the trustees was in any way or form involuntary or compulsory, or that the public at any time had notice, either actual or constructive, of such transfer or surrender. The defendant is presumed responsible for injuries caused by negligence in its duties and obligations to the public, and must be held liable unless it removes every basis of this presumption by evidence. Defendant shows that the trustees took possession under the deed; it must also show its legal authority for making the deed, whereby it could shift its legal liability and transfer to its own trustees the duties which it assumed by the acceptance of its

<sup>1</sup> Citing *Railroad v. Barron*, 5 Wall. 90; *Railroad v. Mayes*, 15 Am. Rep. 678; *Abbott v. Railroad*, 36 Am. Rep. 572; *Railroad v. Salmon*, 35 Am. Rep. 214; *Pierce v. Railroad*, *Ib.* 283. strued and held that the lessor would not be liable thereunder for fire set by lessee's engine. *Hunter v. C. L. & N. R. Co. (S. C.)*, 19 S. E. 197; *Lipfield v. C. C. & A. R. Co. (S. C.)*, 19 S. E. 497. The South Carolina statute con-

charter; performance of which forms the consideration for the grant of the charter. There are many cases in which the companies were exonerated, but there the charters conferred power to mortgage and the possession taken was *in invitum*; and also under special statutes authorizing the transfer of roads to trustees for the benefit of creditors.<sup>1</sup> There being here no statutory provision authorizing the transfer or surrender of the road, it would lead to collusive arrangements if a company could, by voluntary surrender to mortgage trustees, indefinitely substitute them in the exercise of the corporate rights and franchises, and in the discharge of their charter obligations to the public, so as to exonerate the company from liabilities for injuries inflicted in the operation of the road upon the persons or property of the public.

A railroad company in Virginia is a *quasi* public corporation, which can not by its own voluntary contract or collusion surrender its function and responsibilities to agents or trustees of its own selection, living (as in this case) outside the state, beyond the reach of its tribunals or process, with no one in the state to respond to the wrongs or injuries of its citizens, however grievous or heinous they might be.<sup>2</sup> The company can not absolve itself from its public obligations without consent of the legislature.<sup>3</sup>

It may sell or mortgage the personal property, but not with it the right to manage and control the road, nor any corporate right or franchise.<sup>4</sup>

As the company can not escape performance of its obligation by a voluntary surrender under a lease, it follows that a "voluntary surrender to trustees, under a mortgage for which there is no legislative authority, can not have different operation."

<sup>1</sup> Hall v. Railroad Co., 21 Law Rep. 138, and Railroad v. Metcalfe, 4 Metc. (Ky.) 209, relied on by defendant, are discussed as contrary to the weight of authority in an exhaustive and elaborate note. 75 American Decisions, p. 548. In Coe v. Railroad Co., 10 Ohio St. 375, there was legislative authority to mortgage the franchise, to take toll and to maintain the road.

<sup>2</sup> Wood, Ry. Law, § 5, pp. 9, 10; 2 Wood, Ry. Law, § 345, p. 1392; Thomas v. Railroad Co., 101 U. S. 71; 1 Ror. R. R., 238; Pierce R. R., 496 and note.

<sup>3</sup> Thomas v. Railroad Co., 101 U. S. 71; Railroad Co. v. Brown, 17 Wall. 450; Railroad Co. v. Winans, 17 How. 39; Richardson v. Sibley, 11 Allen 65;

<sup>4</sup> Pierce v. Emery, 32 N. H. 484.

It has been held that both the company and the trustees are liable, and that an injured party may sue the company and is not compelled to sue the trustees.<sup>1</sup>

There is no provision of law authorizing the defendant to transfer to trustees or mortgagees under deed of trust given as a mere incumbrance or security, the right and legal capacity to step into the shoes of the company and indefinitely exercise its functions, so as to exempt the company from liability for injuries inflicted by the negligent operation. A mortgage may be good as to property although invalid as to the franchise.<sup>2</sup> But assuming the validity of the mortgage as well upon the franchise as on the property, and also the duty and necessity of the trustees taking possession and holding it, until, under the deed and the law, a sale can be made, this does not authorize an indefinite holding (*eleven* years) during which the company should remain exempt from its legal and moral responsibilities to the public under its charter.

#### SECTION TWENTY-SIX.

**McCoy v. The Kansas City & St. P. & C. B. Ry. Co., 36 Mo. App. 446.**

**Owner company liable for damages by fire by other company using its road.**

Action against the Kansas City, St. Joseph & Council Bluffs Railroad Company for damages to plaintiff by reason of fire set by defendant's locomotive. Judgment for plaintiff affirmed.

The first count charged that the fire was set by defendant's locomotive; the second, that it was set by an engine belonging to the Chicago, Burlington & Quincy Railroad Company, running its trains over defendant's track by virtue of a lease.

The facts show that the engine which set the fire did belong to the Chicago, Burlington & Quincy Company, but there was no proof offered of a lease or other contractual relation between the two companies, hence the court instructed the jury to find for the defendant on the second count.

The verdict is good, based on the first count, charging that the fire was set by defendant's engine; the lessee, taking by

<sup>1</sup> Grand Tower, etc., Co. v. Ullman, 89 Ill. 244.      <sup>2</sup> 3 Wood Ry. Law, § 456.

permission of the statute authorizing the lease, but with the express reservation that the lessor shall not escape any of the responsibilities it owes to the public, is, so far as the public is concerned, the mere agent of the lessor; proof that an act was committed by an agent or servant of defendant, supports the allegation that it was committed by the defendant; and the agent or servant need not be named or referred to in the petition.<sup>1</sup>

On rehearing: The criticism may be just in calling attention to the fact that the original opinion treats the case as one of lessor and lessee, although there was no allegation of a lease in the first count, nor any proof of lease. It did appear, however, that the Chicago, Burlington & Quincy Company had been for a considerable period of time regularly operating its trains over defendant's road with defendant's consent; this certainly gave them at least the relation of licensor and licensee, and the licensor is liable for the negligence of the licensee company in operating its trains. The rule as to individuals in such cases is not applicable to a railroad corporation; it has received its charter from the state, and by its acceptance has taken upon itself burdens and responsibilities which it can not shift without the consent of the state.<sup>2</sup> The allegation as to license is not essential; the case cited to the contrary<sup>3</sup> is not in accordance with the authorities in the original opinion that an allegation as to lease or license is not essential.<sup>4</sup>

<sup>1</sup> Bliss, Code Pl., Sec. 158; Bennett v. Judson, 21 N. Y. 238; Stearns v. Railroad, 46 Mo. 95; Abbott v. Railroad, 80 N. Y. 27; East St. L. & C. R. R. v. Gerber, 82 Ill. 632; Freeman v. Railroad, 27 Minn. 443; Nelson v. Railroad, 26 Vt. 717; Railroad v. Barron, 5 Wall. 90.

<sup>2</sup> Brown v. Railroad, 27 Mo. App. 394; Macon, etc., v. Mays, 49 Ga.

<sup>3</sup> Maine v. Railroad, 18 Mo. App. 388.

<sup>4</sup> Defendant's citations that the statute made the lessor liable, and hence did not embrace other cases, and there was no proof of a lease: 1 Stat. 1879, p. 135, 790; Acts, 1881, p. 77; Matthews v. Skinner, 62 Mo. 329-34; McGuire v. Sav. Inst, 62 Mo. 344-46; Ex parte Snyder, 64 Mo. 58-61. There was no wrong in giving the license, and hence licensor company, like an individual, is not liable for licensee's negligence. Hughes v. Railroad, 66 Mo. 325; Fish v. Dodge, 4 Denio 311-16-17; Dichett v. Duyvial, 67 N. Y. 425; Swords v. Edgar, 59 N. Y. 28-34-35; Rich v. Basterfield, 4 Man. Gr. & Scott 783; Miller v. Staples, 37 Iowa 532; Radclif v. Mayor, 4 N. Y. (4 Const.) 195-200. Plaintiff should not have been allowed to recover upon facts not stated as his cause of action. Len-



## SECTION TWENTY-SEVEN.

**St. Louis, Wichita & Western Ry. Co. v. Eitz, 30 Kan. 30.**

**Lessor not liable for work done on road by lessee's order.**

Action by Ritz & Putnam against the St. Louis, Wichita & Western Railway Company, a Kansas corporation, for supplies furnished to persons alleged to have been its contractors, said defendant having neglected to take the statutory bond for the protection of plaintiffs.

Facts were, in the main, that the defendant leased all of its railway to the St. Louis & San Francisco Railway Company, a Missouri corporation; the latter company gave a contract to Harding & Gilmore for building twenty-five miles of the former's road; in fact the former company never did any work on its line, but it was done for it under contract by the latter company. Both companies had the same officers; but this did not unite, consolidate or cause both to be one and the same, nor did the fact that the founder of the former company organized it as mere matter of speculation, and sold all of its stock to other persons or corporations, wipe out or obliterate the corporation. Hence, the special findings of the jury and the charge of the court, holding both companies to be one and

nox v. Harrison, 88 Mo. 491-95; Bul- White, 15 Iowa 187; Nickerson v.  
line v. Smith, 73 Mo. 151-59-62 and Hydraulic Co., 46 Conn. 24.  
authorities cited. Price v. Railroad, Plaintiff's citations :  
72 Mo. 414; Bank v. Armstrong, 62 Allegation that defendant did the  
Mo. 59 and cases cited; Walnier v. injury is sufficient, though it was  
Railroad, 71 Mo. 514; Edens v. Rail- really done by the other company's  
road. 72 Mo. 212; Light v. Railroad, engine running over the road un-  
89 Mo. 106; Kenney v. Railroad, 70 der oral permission of defendant's  
Mo. 252; Ely v. Railroad, 77 Mo. 34; officers. Singleton v. Railroad, 70  
Abbott v. Railroad, 70 Mo. 668; Ga. 464; Railroad v. Whipple, 22  
Fuller v. Edwards, 18 Mo. App. 677; Ill. 105; Railroad v. Dunbar, 20 Ill.  
Scott v. Robards, 67 Mo. 289-92-93; 623; Railroad v. Baron, 5 Wall. 90;  
Smith v. Railroad, 37 Mo. 287-93. Railroad v. Brown, 17 Wall. 445;  
Plaintiff having based his action on Railroad v. Winans, 17 How. 81;  
failure to observe a particular duty, Railroad v. Campbell, 86 Ill. 443;  
must state in his petition the facts Freeman v. Railroad, 7 Am. & Eng.  
giving rise to such duty. Field v. R. R. Cases 410, and elaborate note  
Railroad, 76 Mo. 614-6; Moke's Van citing many authorities; Wise v.  
Sanford's Pl. (3d Ed.), 219; Buffalo Railroad, 85 Mo. 178.  
v. Halliway, 7 N. Y. 493; Lease v.

the same, and that the supplies can be considered as having been furnished to defendant's contractors, were erroneous; they were separate and distinct corporations created by different states; the latter was not the agent of the former, and the said contractors were not contractors with the former.

### SECTION TWENTY-EIGHT.

#### Sundry instances.

Although a lease is made with legislative consent, still the lessor is liable for injuries to the lessee's passenger. The statute says the lease shall not release lessor from any duty or liability; one of these is to compensate persons injured in the operation of the road. *Quested v. Newburyport Horse Ry.* 127 Mass. 204.

Lessor is liable for goods by it received to be carried by its lessee, a foreign corporation; to hold otherwise would enable lessor to divest itself of its public duties undertaken as the consideration upon which it received its charter. *Langley v. Boston, etc., R. Co.*, 10 Gray 103.

On a lease without statutory consent the lessor is liable for lessee's neglect causing injuries at defective highway crossing. *Freeman v. Minn., etc., R. Co.*, 28 Minn. 443.

The lessor is liable for injury to lessee's passenger: *Fisher v. W. V. & P. R. Co. (W. V.)*, 19 S. E. 578; *Abbott v. Johnson*, 80 N. Y. 27. Is not liable: *Mahoney v. Ry. Co.*, 63 Me. 68. Road not fenced, lessor liable for horse killed by lessee: *Whitney v. Atlantic, etc., Co.*, 44 Me. 362. Liable for fire set by lessee's engine: *Steams v. Atlantic, etc., Co.*, 46 Me. 117. Not liable to lessee's passenger for injury caused by defect in track: *Murch v. Concord, R. R. Co.*, 29 N. H. 35. Lessor is liable for injuries to lessee's passenger by defect in track: *Central, etc., Co. v. Phinazee (Ga.)*, 21 S. E. 66, citing *R. R. Co. v. Mayes*, 49 Ga. 355; *Singleton v. R. R. Co.*, 70 Ga. 464; *R. R. Co. v. Liddell*, 85 Ga. 482; 11 S. E. 853; or for mismanagement causing collision: *Booknight v. C., C. & A. R. Co. (S. C.)*, 19 S. E. 915; or for assault by lessor's conductor though he be under lessee's hire and control: *C. & O. R. Co. v. Osborne (Ky)*, 30 S. W. R. 21.

The lessor and lessee companies are jointly liable for injuries done by the lessee. *Pennsylvania Co. v. Ellett*, 132 Ill. 654.

It would seem as though a constituent can be still subjected to insolvency proceedings even after consolidation; such proceedings are found sustained against a constituent company upon allegation that it is organized under the laws of Connecticut and has its office in Middleton. (No mention is made prior to the appeal of a consolidation having taken place.) *Platt v. N. Y., etc., R. R. Co.*, 26 Conn. 544.

When a road is in the hands of trustees exercising all the corporate functions, they are regarded as agents of the corporation and the latter is liable for freight lost. *Grand Tower Manf., etc., Co. v. Ullman*, 89 Ill. 244.

The constituent company preserves its continuance for some purposes, as, for instance, to execute an assignment of a patent right contracted for prior to the consolidation. This is one of the "demands" that the constituent must answer to by terms of the statute. *Edison Electric L. Co. v. New Haven Electric Co.*, 35 Fed. Rep. 233.

A suit pending against it for a death claim does not abate by reason of a consolidation. *Evans v. Interstate Rapid T. Ry. Co.*, 106 Mo. 594; 17 S. W. 489.

Nor does defendant's change of corporate name have any effect on a pending suit. *Welfley v. Shenandoah I. L. M. & M. Co.*, 83 Va. 768; 3 S. E. 376.

The statute declaring that a consolidation shall not cause a suit to abate shows the legislative intent to preserve the corporate existence; it is more than a rule of practice and hence will be respected in the federal courts. The corporate existence may be prolonged for special purposes. Citing *Banking Co. v. Ga.*, 92 U. S. 665; *Bank v. Colby*, 21 Wall. 614; *Edison E. L. Co. v. Westinghouse*, 34 Fed. 232.

Original company is not liable for damage done on road after its sale under foreclosure and possession taken. *Western R. Co. v. Davis*, 66 Ala. 578.

## CHAPTER XIV.

## LIABILITIES OF THE SUCCEEDING CORPORATION.

The liabilities of the succeeding corporation are determinable by the constitution and laws as they stand at the time of the creation of such successor, and not by the laws existing at the creation of the constituent or predecessor corporation; determinable also by the constitution and laws of the state under which the consolidation is created, although some of the constituents are creatures of other states.

The succeeding corporation (when not a purchaser), obtaining all of the property, is held, impliedly as well as by terms of statute, to have assumed all of the debts, as also liabilities for torts of the preceding corporations; such liability must, however, be enforced by a direct proceeding against it, giving it a day in court, and not by mere substitution in a judgment obtained against the predecessor.

Corporations owing duties to the public, as, for instance, owners of railroads, are not released by transferring the discharge of the same to others, although such others may also be liable; the various relations of lessor and lessee are herein considered with reference to injuries occasioned by the one or the other, either *ex contractu* or *ex delicto*.

The succeeding corporation, when a purchaser upon a new consideration, and not merely a successor in interest of the former corporation, takes the property free from every demand, except specific liens, or equities of which it had notice; obtaining property and paying for it in stock of the succeeding corporation is not a purchase upon consideration, but a mere substitution of interests.

Even the purchaser upon consideration takes the property charged with the duties imposed by the charter under which it was obtained, as also those imposed by law, but not those arising from the merely personal contracts of the preceding corporation.

## SECTION ONE.

**Shields v. Ohio, 95 U. S. 819.**

**Consolidated corporation bound by restrictions as to rates of fare existing at time of consolidation, though same were not obligatory on the constituents.**

The Junction Railroad Company was incorporated in Ohio March 2, 1846, by act of the legislature. The eleventh section empowered the company to charge such rates as it might deem reasonable. The Toledo, Norwalk & Cleveland Company was incorporated March 7, 1850, amended January 20, 1851; the twelfth section of the amendatory act declared that in case the Junction company should become consolidated with it, the consolidated company might assume the name of Cleveland & Toledo Railroad Company and in such event be governed by sections 9, 10, 11, 15 and 17 of the Junction company's act, and, in other respects, by the act incorporating the Toledo, Norwalk & Cleveland Company.

The general act of March 3, 1851, relates to the consolidation of railroad companies, stating the details of the process and that such new company shall possess all the powers, rights and franchises of the consolidating companies. The constitution took effect September 1, 1851, reserving the right to alter or repeal the corporation laws.

June 15, 1853, the aforesaid companies consolidated under the said acts of January 20, 1851, and March 3, 1851.

The act of April 10, 1856, authorizes Ohio companies to consolidate with those of other states, and provides that such consolidated companies shall be deemed and taken to be one corporation; the old stock shall be extinguished, a board of directors of the consolidated company shall be elected, new stock created and issued to the parties entitled; those refusing to receive it were to be paid the highest market price of the old; the new corporation may be sued as any other.

The consolidated road last mentioned was subsequently consolidated with another, thus forming the Lake Shore Railway Company, which in turn consolidated with still another and formed the Lake Shore & Michigan Southern Railway Company, April 6, 1869.

By act of April 25, 1873, the State of Ohio limits railroad fares to three cents per mile; the court holds that the Lake Shore & Michigan Southern Railway is subject to this limitation.

Following is opinion in full:

The plaintiff in error was the conductor of a train of cars upon the Lake Shore & Michigan Southern Railway, between Elyria and Cleveland. Ulrich was a passenger, intending to go from the former to the latter place. The intermediate distance was twenty-five miles. The fare fixed by the company was ninety cents. Ulrich offered to pay seventy-five cents, which was at the rate of three cents per mile, and refused to pay more. The conductor ejected him from the train, and was thereupon indicted in the proper local court for assault and battery. The court instructed the jury, Ulrich had tendered the proper sum, and that Shields had no legal right to demand more. The case turned upon this point. It was not claimed that the defendant was guilty, if Ulrich was in the wrong. A verdict and judgment were given against Shields. The case was removed by a writ of error to the supreme court of the state. The judgment of the court below was affirmed. Shields sued out this writ of error, and brought the case here for review. The only question presented for our determination, is his legal right to demand more than Ulrich offered to pay.

A brief chronological statement with respect to the provisions of the constitution, and those of the laws of the state bearing upon the subject, is necessary to a clear presentation of the point to be decided.

1. An act passed March 2, 1846, incorporated the Junction Railroad Company, and authorized it to build a railroad from Cleveland to Elyria, and thence west. The eleventh section empowered the company to charge such tolls for the transportation of freight and passengers as it might deem "reasonable." The twenty-second section declared that after the lapse of ten years from the completion of the road the state might reduce the tolls "should they be unreasonably high," and might exercise the same power at intervals of every ten years thereafter. It was upon the road built under this act that the present controversy arose.

2. The act of March 7, 1850, incorporated the Toledo, Nor-

walk & Cleveland Company, and the charter was amended by an act of January 20, 1851.

The twelfth section of the latter act declared that in case the Junction company should become consolidated with the Toledo, Norwalk & Cleveland Company, the consolidated company might assume the name of the Cleveland & Toledo Railroad Company, and in that event, should be governed by sections 9, 10, 11, 15 and 17 of the act incorporating the Junction company, and in other respects by the act incorporating the Toledo, Norwalk & Cleveland Company, and the acts amendatory thereof. The twenty-second section of the act first named, which allowed the state, after lapse of ten years, to regulate the tolls of the Junction company in the event specified, is not one of the sections enumerated.

3. The act of March 3, 1851, was a general act, authorizing the consolidation of railroad companies coming within its provisions. The process was prescribed with great fullness of details. Sec. 3 declared: "And such new corporation shall possess all the powers, rights and franchises conferred upon such two or more corporations by the several acts incorporating the same, or relating thereto, respectively, and shall be subject to all the duties imposed by such acts, so far as the same may be consistent with the provisions of this act."

4. The constitution of Ohio, of 1851, took effect on the 1st of September in that year. It declared that "no special privileges shall ever be granted that may not be altered, revoked, or repealed by the general assembly." (Art. 1, Sec 2.) "The general assembly shall pass no special act conferring corporate powers." (Art. 13, Sec. 1.) "Corporations may be formed under general laws, but such general laws may from time to time be altered or repealed." (Art 13, Sec. 2.)

5. On the 15th of June, 1853, the Junction company became consolidated with the Toledo, Norwalk & Cleveland Company, pursuant to the provisions before mentioned of the acts of January 20, 1851, and March 3, 1851.

6. The act of April 10, 1856, 4 Curwen 2791, authorizes railroad companies of Ohio to consolidate with such companies of other states. The third section declares that such consolidated companies respectively "shall be deemed and taken to be one corporation, possessing within the state all the rights, privileges and franchises, and subject to all the restric-



tions, liabilities and duties of such corporations of this state so consolidated." It was provided that the old stock should be extinguished, that a board of directors of the consolidated company should be elected, and that new stock should be created and issued to the parties entitled to it. Those refusing to receive it were to be paid the highest market price for their old stock.

The seventh section enacts "that suits may be brought and maintained against such new corporation in the courts of this state, for all causes of action, in the same manner as against other railroad companies of this state."

7. On the 11th of February, 1869, by an agreement of that date, the Cleveland & Toledo and the Lake Shore *Railroad* Company became consolidated under the name of the Lake Shore *Railway* Company.

On the 6th of April, 1869, the Lake Shore and the Michigan Southern & Northern Indiana Railroad Companies were duly consolidated under the name of the Lake Shore & Michigan Southern Railway Company.

Shields, the plaintiff in error, was an employe of this company when he ejected Ulrich.

8. The act of April 25, 1873, provides that "any corporation operating a railroad in whole or in part in this state may demand and receive, for the transportation of passengers over said road, not exceeding three cents per mile, for a distance of more than eight miles."

The defendant in error insists that the power of the company in the case in hand was fixed and limited by this act. The plaintiff in error denies this, and maintains that the eleventh section of the first named act of 1846 is the governing authority.

In support of this view, it is further maintained that this section was a contract, and that it was simply transferred to each successive consolidated corporation, including, finally, the Lake Shore & Michigan Southern Railway Company, and that at the time of the occurrence here in question it was in full force.

This renders it necessary to consider the legal *status* and character of the new corporation. In the present state of the law, a few remarks upon the subject will be sufficient.

The legislature had provided for the consolidation. In each

case, before it took place, the original companies existed and were independent of each other. It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporations subsisted. All—the old and the new—could not co-exist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution. That being done, *eo instanti* the new corporation came into existence. But the franchise alone to be a corporation would have been unavailing for the purposes in view.

There is a material difference between such an artificial creation and a natural person. The latter can do anything not forbidden by law. The former can do only what is authorized by its charter. *Railroad Company v. Harris*, 12 Wall. 65. It was therefore indispensable that other powers and franchises should be given. This was carefully provided for. The new organization took the powers and faculties designated in advance in the acts authorizing the consolidation—no more and no less. It did not acquire anything by mere transmission. It took everything by creation and grant. The language was brief, and it was made operative by reference. But this did not affect the legal result. A deed *inter partes* may be made as effectual by referring to a description elsewhere as by reciting it in full in the present instrument. The consequence is the same in both cases.

If the argument of the learned counsel for the plaintiff in error be correct, the constitutional restrictions can be readily evaded. Laws may be passed, at any time, enacting that all the valuable franchises of designated corporations antedating the constitution shall, upon dissolution, voluntary or otherwise, pass to and vest in certain newly created institutions of the like kind. The claim of the inviolability of such franchises would rest on the same foundation as the affirmation in the present case. The language of the constitution is broad and clear, and forbids a construction which would permit such a result.

When the consolidation was completed, the old corporations were destroyed, a new one was created, and its powers were “granted” to it, in all respects, in the view of the law, as if the old companies had never existed, and neither of them had

ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation. It did one as much as the other. In this respect, there is no ground for any distinction.

These views are sustained by several well-considered cases exactly in point. One of them embodies the unanimous judgment of this court. *Clearwater v. Meredith*, 1 Wall. 25; *McMahan v. Morrison*, 16 Ind. 172; *State of Ohio v. Sherman*, 22 Ohio St. 411; *Shields v. the State of Ohio*, 26 Id. 86.

The constitutional provision that "no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the general assembly" entered into the acts under which the consolidations were made, and rendered the corporations created and the franchises conferred subject to repeal and alteration, just as if they had been expressly declared to be so by the act. The act of 1873, in the particular in question, was a legitimate exercise of the reserved power of alteration, and was therefore valid. *Parker v. The Metropolitan Railroad Co.*, 109 Mass. 506.

Another branch of the argument of the counsel for the plaintiff in error calls for some further remarks.

It is urged that the franchise here in question was property held by a vested right, and that its sanctity, as such, could not be thus invaded. The answer is *consensus facit jus*. It was according to the agreement of the parties. The company took the franchise subject expressly to the power of alteration or repeal by the general assembly. There is, therefore, no ground for just complaint against the state.

Where an act of incorporation is repealed, few questions of difficulty can arise. Equity takes charge of all the property and effects which survive the dissolution, and administers them as a trust fund, primarily for the benefit of the creditors. If anything is left, it goes to the stockholders. Even the executory contracts of the defunct corporation are not extinguished. *Curran v. State of Arkansas*, 15 How. 304.

The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong can not be inflicted under the guise of amendment and alteration. Beyond the sphere of the reserved powers, the

vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases. Two authoritative adjudications throw a strong light from opposite directions upon this subject. We cite them only for the purpose of illustration. In *Miller v. N. Y. & E. Railroad Co.*, 21 Barb. (N. Y.) 513, the legislature under the reserved power of alteration, required the company, which had been previously incorporated, to construct a highway across their road. The work was expensive and of no benefit to the company. The act imposing the burden was held to be void.

In *Mayor and Aldermen of Worcester v. Norwich and Worcester R. R. Co. and others*, 109 Mass. 103, the legislature had passed an act requiring the railroad companies therein named to unite in a passenger station in the city of Worcester (the place to be fixed as provided), to extend their tracks in the city to the union station, and, after the extension, to discontinue parts of their existing locations. The act was held to be constitutional and valid, being a reasonable exercise of the right reserved to the legislature to amend, alter or repeal the charters of those companies. See also, *Commonwealth v. Essex Company*, 13 Gray (Mass.) 239, and *Crease v. Babcock*, 23 Pick. (Mass.) 334.

It is unnecessary to pursue the subject further in this case. Judgment affirmed.

MR. JUSTICE FIELD and MR. JUSTICE STRONG dissented.

MR. JUSTICE STRONG: I dissent from the judgment in this case.

I agree that, by the consolidation effected under the statutes, a new corporation was created, with the powers and restrictions of the constituent corporations. I agree, therefore, that the legislature reserved the power to repeal, alter, or amend the charter. But I deny that under this reserved power it was competent for the legislature to take away the right given to the company to charge such freight and tolls as the directors might deem reasonable, while at the same time continuing the company in existence, subject to all the duties imposed upon it. Such an alteration is taking away the property of the

company without compensation, as much as would be taking away its lands.

MR. CHIEF JUSTICE WAITE did not sit in this case, nor take any part in deciding it.

(The opinion is weakened by the fact that the Chief Justice and Justice Harlan did not participate, see page 326 and memorandum, opposite table of cases, and that Justices Field and Strong dissented; leaving it the opinion of only five.)<sup>1</sup>

## SECTION TWO.

**Pick v. Chicago & North-Western Ry. Co., 6 Biss. 177.**

**Charters of original companies being subject to legislative alteration, the consolidated corporation is subject to subsequent legislation as to fares.**

Bill in federal court, Wisconsin, by bondholders against the state officials and the railroad company for an injunction preventing them from enforcing an act of the legislature limiting railroad fares, on the ground that it impaired their security and contract.

The company was created by the consolidation of several companies, organized under the laws of Wisconsin and Illinois, respectively; the new corporation was confirmed by act of the legislature of Wisconsin, March 8, 1862.

Motion heard before Davis, Drummond and Hopkins, JJ. Opinion by DRUMMOND, J., for the court, in substance as follows:

The charter of railroad corporations, under the constitution of Wisconsin "may be altered or repealed by the legislature at any time after their passage." This condition is the same as if specifically incorporated in all the numerous grants under which the Chicago & North-Western Railway Co. now claims its rights of franchise and property, and became a part of every contract or mortgage made by said company or by any of its numerous predecessors under which it claims the share, and bondholders took their stock or securities subject to this paramount condition and of which they had notice; if the corporation could clothe its creditors with an ab-

<sup>1</sup> No special privilege accompanies St. Louis, etc., v. Gill, 15 S. C. R. 484, property into the hands of a purchaser 487, and citations. unless statute expressly so direct.

solute and unchangeable right it would enable the corporation by its own act to abrogate a constitutional provision. "This principle is not changed because authority is given by the legislature of the state to a corporation to consolidate with a corporation of another state. The corporation of this state is still subject to the constitution of Wisconsin, and there is no power anywhere to remove it beyond the reach of its authority."

The legislature had the right to alter the terms of the charter; the fact that such alteration might affect the value of the property or franchises, can not touch the question of power in the legislature. The fact that grants of land were made by congress to the state can not change the rights of the corporation or of the creditors. If the state has not performed the trust, it must answer to the United States.

### SECTION THREE.

**Campbell et al. v. The Marietta & Cincinnati Railroad Co., 23 Ohio State Reports, 168.<sup>1</sup>**

**Restriction as to the rates of fare is binding on consolidation.**

The property of an insolvent railroad company was, by authority of a statute, sold to its stockholders and creditors, who were organized into a corporation for that purpose. It is held that the statute being silent on the topic, the new organization takes the property subject to the restrictions as to rates of fare in the charter of the original company.

A connecting road was sold under judicial process to the new organization; it is held that such other road remains subject to the restrictions as to fares contained in its charter. These restrictions and not those of the purchasing company's charter must control; to hold otherwise would make an inequality in the bidding, as the purchase price would be affected by the unequal restrictions in the various charters of the bidders.

The connecting road must be held to have been bought under other statutes and not under the original company's charter, which authorized it to locate and construct branches; these terms do not include the power to purchase a road constructed under a different charter.

<sup>1</sup> The briefs are extensive and interesting.

## SECTION FOUR.

**The Indianapolis, Cincinnati & Lafayette Railroad Co. v. Jones, 29 Indiana 465.<sup>1</sup>**

**Consolidated company directly liable for constituent's torts.**

Suit against a consolidated corporation for killing of a steer by one of the constituents, prior to the consolidation.

The consolidation is directly liable; plaintiff should have averred the facts of the consolidation, but not having done so and no objection being raised his verdict is good.

Process could not have been served on the constituent. It had ceased to be a separate legal entity. "Instead of two, there was now but one corporation, made up of the mingled elements of the two pre-existing companies, so combined and merged that neither could be separately identified or brought into court." All their property is vested in the new one. No provision is made by the consolidation statute as to debts. The analogy of the law does not allow injustice to be done, hence, as the former company can not be sued, the new company must be deemed directly liable to suit for the debts and liabilities of the old.

## SECTION FIVE.

**The Selma, Rome & Dalton R. R. Co. v. Harbin, 40 Ga. 706.**

**Consolidation not liable without being brought into court to have judgment against it in suit pending against constituent at time of consolidation.**

Action against the Dalton & Jacksonville Railroad Company as garnishee, pending which said company was consolidated with two others, by agreement in writing, to "unite together so as to form one consolidated company, with all the rights,

<sup>1</sup> Same case in 95 Am. Dec. 654, (Kansas), 34 Pac. Rep. 805; 36 Pac. with note, citing McMahon v. Morison, 79 Am. Dec. 420; State v. Bailey, 79 Am. Dec. 405; Columbus v. Powell, 40 Ind. 41; Jefferson v. Hendricks, 41 Ind. 60. The corporations working jointly, though without authority, are still liable for injuries through negligence. B. & O. v. Meyers, 10 C. C. A. 485.

See also Berry v. K. C., etc., Co.



privileges and franchises belonging to either" of them, in order to act as one company. "All the debts, contracts and obligations and liabilities of each one of said parties to this contract and agreement are hereby assumed by the consolidated company formed under this contract." The agreement bound each to procure legislative sanction of the agreement and consolidation; which was done in Georgia and Alabama, and the name changed to "The Selma, Rome & Dalton Railroad Company."

Thereafter plaintiff's counsel obtained an order reciting that service of garnishment had been served on the Dalton & Jacksonville Railroad Company, "that said Dalton & Jacksonville Railroad Company, whose name has been (since the service of said summons) changed to that of The Selma, Rome & Dalton Railroad Company, has never filed any answer to said summons," and ending, "that he now recover of said railroad company, but now known as The Selma, Rome & Dalton Railroad Company, the full amount," etc., etc. This judgment the consolidated company moved to set aside. Motion refused; reversed.

The act allowing consolidation expressly provides that each company should continue liable to third persons for all obligations. This provision of the act can not be carried out if the Rome & Jacksonville Railroad has ceased to exist. For the purpose of enforcing its obligations upon it, those whom it owes may treat it as still existing and recover judgment against it. And this, in fact, is nothing but what the Code, section 1643, had previously enacted. The new company's undertaking is an additional security, a new remedy, a contract, but not a part of the charter, and to be enforced only as the contract of individuals, by direct suit, giving the company notice thereof and an opportunity to deny it. It can not, as here, be enforced without any evidence being taken proving its existence. Even in a direct suit against the new company there would have to be proof that it had undertaken to pay the debts of the old companies. "Is it liable for them under the act of 1866, except by its contract?" The judgment was illegal; there was no notice to the new company, and no proof that it was liable, or had ever made such a contract as it now appears was made.

## SECTION SIX.

**Davis v. Providence & Worcester R. R. Co., 121 Mass. 134.**

**Lessee liable for fire set by its engine while running upon lessor's road.**

Defendant company, running its trains upon a road belonging to another company, is liable for injuries caused by fire set by its locomotive. It has been held that the owner of the road is liable for injuries caused by the locomotive of another corporation,<sup>1</sup> using its track under a lease or other agreement. The owner of the road can not relieve itself from its statute liability by merely leasing its property to some other party. But the lessee or other corporation owning the engine is also liable; it comes literally under the statute; the fire is communicated by its engine, in its lawful use of the road for its own profit and business; the route for the time being is the route of the defendant, the mischief is done by it, and there is no reason why it should not be held liable, although the law has given to the injured party the right, if he sees fit, to seek his remedy against the corporation owning the road.

## SECTION SEVEN.

**Illinois Central R. R. Co. v. Kanouse, 39 Ill. 272.**

**Lessee liable for stock killed by its train running on lessor's unfenced road.**

Action against the Illinois Central Railroad Company to recover value of animals killed by one of its trains running upon the unfenced road of the Peoria & Oquawka Company; the running arrangement required the owning road to keep the same in repair; the defendant was to pay a certain portion of its earnings on that road for the use thereof. The owning company retained possession and use of the road for its own business.

Defendant held liable; declaration being in case under the

<sup>1</sup> *Ingersoll v. Stockbridge & P. R. R.*, 8 Allen, 438; *Daniels v. Hart*, 118 Mass. 543.

statute. Defendant contends that it had a mere license to run on the track, no authority to enter on or fence the land on the sides of the track, and no obligation to do so, hence no liability for not doing it.<sup>1</sup> Defendant's citations fully sustain the position, but this court can not concur therein.

It has been held that the company using the track is not liable for injury to a cow caused by defect in a cattle guard which the owner of the track was under obligation to maintain.<sup>2</sup> Redfield, in his treatise on Railways, questions the soundness of this, and suggests that both companies are liable, one for suffering the road to be used in that condition, the other for using it.<sup>3</sup> In the present case the owner company would clearly be liable if sued, having the duty by the agreement to fence the road. The defendant is also liable for using a defective road; public policy requires that it should be responsible for injury resulting from using a defective road; they knew the defects when they made the agreement, and they took the road knowing the risk. The fencing law was enacted for the public good; it would be defeated if an irresponsible owner could lease an unfenced road to a responsible company which would not be liable for the injuries. The company using the road is *pro hac vice* the owner, and it has been so held.<sup>4</sup>

#### SECTION EIGHT.

**Wabash, St. Louis & Pacific Ry. Co. v. Peyton, 106 Ill. 534.**

**Lessee liable for death occasioned by its engine, although lessor's yardmaster committed the negligence which caused the accident.**

Defendant railroad company ran its cars under a lease upon a portion of the track of another company. The lessor company retained the control of the defendant's trains, the switch engine of the lessor made up defendant's trains; when defendant performed that service it was under the direction of lessor's yardmaster. A train was thus made up, when some one threw

<sup>1</sup> Citing *Whitney v. The Atlantic & St. Lawrence R. R. Co.*, 44 Maine, 862; *Wyman v. Penobscot & Kennebec R. R. Co.*, 46 Maine 162.

<sup>2</sup> *Parker v. Rensselaer & Saratoga Railway*, 16 Barb. (N. Y.) 315.

<sup>3</sup> Redfield on Railways, 420.

<sup>4</sup> *Clement v. Canfield*, 28 Vt. 302.

loose boards upon the track; the yardmaster, in removing them, left one so near the track that it was struck by defendant's engine and forced through a fence and caused the death of a person. The defendant was held liable; it is not released by reason of having placed its own engines and servants under the control of the other company's yardmaster, who, by reason of the lease and agreement, became *pro hac vice*, for the time and place, the servant of the defendant. The defendant could not exonerate itself from its legal duties and responsibilities by contract with others, unless released by the general assembly. Again, the defendant, when receiving its franchises, assumes the duty of using care for the safety of all persons; hence it should and easily could have kept the track in safe condition and prevented the injury; it made this portion of the track its own by using it. It is unnecessary to inquire whether the lessor company is also liable; if it is, the plaintiff had her option to sue either alone, and it may be both, as tortfeasors; but she is not required to sue either one instead of the other, or to sue both jointly.

### SECTION NINE.

**North Carolina R. R. Co. v. Drew, 8 Woods 691.**

**Consolidation takes property subject to equities existing against constituent.**

Bill in federal court upon foreclosure of railroad mortgages. Opinion by BRADLEY, Circuit Justice, substantially as follows:

Dibble and his associates having purchased a railroad, which was then subject to a vendor's lien, became incorporated as purchasers and owners of the property.<sup>1</sup> This company so formed, being constituted of the same persons, only clothed with corporate powers, received the property subject to said lien. This company thereafter consolidated with another.<sup>2</sup> The law made it a term of the consolidation that the consolidated company should assume all the debts and obligations of the former company. "This consolidation, by which the two companies joined their properties together, did not discharge the lien."<sup>3</sup>

<sup>1</sup> Act of legislature of Florida, June 24, 1869. for prior years, are also a charge on the property; extensive discussion in

<sup>2</sup> Act of June 24, 1869, Sec. 14. Bloxham v. Florida, C. & P. R. Co.,

<sup>3</sup> Taxes (though not yet assessed) 17 Southern 902.

The property of the Tallahassee company was brought into the common concern with all pre-existing equities attaching thereto. The consolidated company having, as one of its component parties, the Tallahassee company, which held subject to the lien, can not be regarded as a *bona fide* purchaser without notice. The notice with which that company was affected, in relation to the property brought with it into the common fund, affected also the consolidated company. Besides, the persons who held the principal stock in and controlled the one company, likewise held the principal part of the stock in and controlled the other company." The bondholders having entered into an amicable arrangement, do not contest the lien. The vendor's lien is held good.<sup>1</sup>

#### SECTION TEN.

**Charity Hospital v. New Orleans Gas Light Co., 4 Southern 433.**

**The consolidated company must furnish gas free to the hospital as agreed by the original company.**

The New Orleans Gas Light Company was by its charter obligated to give gas free to the Charity Hospital; expiration of the charter was fixed at April 1, 1875, but was subsequently extended to April 1, 1895; said company was on March 29, 1875, consolidated with the Crescent City Gas Light Company, which was at the time in the exercise of a privilege claimed to be exclusive for furnishing gas. It was held that the new company, the result of this consolidation, must continue to furnish the gas free to the hospital.

The charters of the two former companies terminated their existence<sup>2</sup> on March 29, 1875; all the "powers, rights, liabilities and vitality which both possessed at that very moment were infused and incorporated into the new company, which was then born of the amalgamation. The very legal existence of the defendant company hangs upon the vivifying breath of that legal creation. It seems quite natural for the defendant,

<sup>1</sup> There is an extended discussion of    <sup>2</sup> Gas Co. v. Manufacturing Co., and decision as to the rights of several 115 U. S. 697; 6 S. C. R. 272; Fee other parties upon the different divisions of the roads. Case, 35 La. Ann. 416.

in its present attitude, to continue to draw the breath of life from the new being created out of the union of its parents, who ceased to exist at its birth, while it unnaturally repudiates the essential conditions legally imposed on its creation."

Even when no provision is made, the new company "has been held liable to all the obligations of the former ones, to the very necessity of the case, and to prevent the failure of justice."<sup>1</sup>

### SECTION ELEVEN.

**Chicago, Rock Island & Pacific Railroad Co. v. Moffitt, 75 Ill. 524.**

**Consolidation liable for overflow caused by obstruction placed by constituent.**

Suit for damages caused to plaintiff's land by bridge on defendant's road, causing an obstruction and diversion of the waters of a stream, thereby making same overflow the land. The bridge was built by the Peoria & Bureau Valley Railroad Company, which was thereafter amalgamated with the Chicago & Rock Island Railroad Company, and thus formed the defendant company, the Chicago, Rock Island & Pacific Railroad Company.

Defendant contended that the nuisance was created by the original company, and that the defendant should be considered as a grantee whose grantor had created a nuisance, and can not be held liable without notice and request to abate.

There was a statutory and continuing duty to restore the stream to a safe condition;<sup>2</sup> the corporation on which it was imposed and its lessee, amalgamated by authority of the statute, form the component parts of the defendant; such new amalgamated corporation succeeds to all the faculties and rights of the several components, and must, as a necessary consequence, be subject to all the conditions and duties imposed by the law of their creation; defendant is an artificial being, composed of two other artificial beings, the latter being the tortfeasor as to the original construction of the road; defendant is charged with the same duty as that which the original wrongdoer violated,

<sup>1</sup> Field on Corporations, § 435; Taylor on the Law of Corporations, § 425. 12 N. Y. 486; Cott v. The Lewiston R. R. Co., 86 N. Y. 214.

<sup>2</sup> Brown v Cayuga & S. R. R. Co.,

and hence can not insist upon notice of its breach and request to perform it. Defendant can not be considered as a grantee of a grantor who created a nuisance.<sup>1</sup>

The authorities are not uniform as to necessity of notice to one who continues a nuisance; every continuance is a fresh nuisance.<sup>2</sup> The doctrine contended for is not applicable to this case; and, moreover, the record shows that notice was given.

### SECTION TWELVE.

**Western Union R. R. Co. v. Smith, 75 Ill. 496.**

**Consolidation liable in assumpsit for debt of constituent.**

Assumpsit against the Western Union R. R. Co., for amount of work and labor done for the Northern Illinois Railroad Co., which consolidated with The Western Union Railroad Co. and formed a new company under that name. Portion of the work was performed before and a portion after the consolidation. The articles provided that the new company should assume all the debts and liabilities of the old companies and should carry out and perform all the unexecuted contracts; the legislative act ratifying the consolidation saves the rights and remedies of creditors, hence the creditor has his action against the new company.

### SECTION THIRTEEN.

**The Eaton & Hamilton R. R. Co. v. Hunt et al., 20 Ind. 457.**

**The consolidated company may be sued directly for the constituent's debts.**

An Indiana corporation was consolidated with an Ohio corporation; it was agreed that the latter should be preserved and remain intact as if no consolidation had taken place; that

<sup>1</sup> As in *Penruddock's case*, 5 Rep. 100.      taining a nuisance although it receives the property in that condition

<sup>2</sup> *Brown v. Cayuga & S. R. R. Co.*, 12 N. Y. 486.      from the state itself. *Western & A. R. Co. v. Cox* (Ga.), 20 S. E. 68.

A corporation is liable when main-



the organization and name of the former should cease and all its property and franchises be transferred to, and merged in the latter, which assumed the same, and was to pay all the debts and liabilities. The Indiana company had issued bonds and mortgage before the consolidation; it is held that suit thereon is properly brought against the Ohio company.

#### SECTION FOURTEEN.

**Warren v. Mobile & Montgomery R. R. Co., 49 Ala. 582.**

**Consolidation may be sued directly for death loss of constituent.**

Action to recover damages for death of passenger upon a railroad. The corporations owning the same at the time of the accident, afterward became consolidated and amalgamated with another corporation and thus formed a consolidated corporation which was made defendant to the suit; judgment was given below for defendant on demurrer to the declaration, but reversed above and defendant held liable.

The act of consolidation provides that the rights of the creditors of the said two companies shall not thereby be in any way affected. It continues their separate existence, and constitutes the president of the new organization, in law, as to service of process, the president of either of the original corporations.<sup>1</sup> The new company was authorized to dispose of the properties and collect the demands of each of said companies.

The purpose of the act was not to prescribe the manner in which demands were to be enforced against the original companies, but out of abundant caution to make sure that no remedy should be lost or impaired. The action might have been maintained against the original company, and "it might also have been necessary to bring a suit against the defendant to recover the assets. The law abhors circuitry of action, and there is no good reason why the defendant, who is to pay, may not be directly sued."<sup>2</sup>

<sup>1</sup> Acts 1868, p. 82.

How. 388; *Ready & Banks v. Tusca-*

<sup>2</sup> Citing *Philadelphia, Wilmington & Baltimore R. R. Co. v. Howard*, 18

## SECTION FIFTEEN.

**St. Louis & San Francisco R. R. v. Marker, 41 Arkansas 542.**

**Consolidation held directly liable for injury to constituent's employe.**

Action against a railway company for personal injuries sustained in its service by a laborer on a construction train. Plaintiff alleged that he sustained the injury in defendant's employment.

Defendant's third plea averred that defendant was not the owner of the railroad nor operating the same at the date of the alleged injury, but that the plaintiff was the servant of the St. Louis, Arkansas & Texas Railway, a corporation with which the defendant consolidated about one month thereafter.

As to this plea the supreme court says that as the articles of consolidation show that defendant "assumed the payment of all debts and liabilities, and the fulfillment of all obligations owing by the companies with which it was consolidated, it is not to be supposed that there was any extraordinary amount of merit in its third plea." (Judgment for plaintiff reversed on other grounds.)

## SECTION FIFTEEN (Continued).

**State v. Baltimore & L. R. Co., (Md.) 26 Atl. 865.**

**Consolidation liable at law for prior injury to servant of constituent.**

Employe of railroad company was killed in the service. The company was afterward consolidated with another. Suit was then brought directly against the consolidation. Held, properly brought. The two original companies ceased to exist; a third came into being; it "comprehends both of them. It is composed of both. It is in effect both united into one. Nothing is destroyed by the consolidation;" all rights and all liabilities are preserved. "The new corporation thus created was in reality the embodiment under another name of the two formerly existing. They had been joined together in every faculty and function and molded into an indivisible unit with none of their rights impaired and none of their responsibilities abated."<sup>1</sup>

<sup>1</sup> It is said that it would be a bur- defend against the debts incurred by lesque on justice to allow a city to its predecessor, a town. City of Olney

**Cleveland, etc., v. Prewitt, (Ind.) 83 N. E. 367.**

**Consolidation directly liable at law.**

Person injured by railroad company which subsequently forms with another company a consolidated company, may sue such consolidation for such injury without averring that it assumed the liability of the constituent company. The mere act of consolidation involves and will be held to imply such assumption; the articles of consolidation need not be pleaded; it suffices to allege consolidation. "The suit is not based on those articles as a contract but on the tort of the C., I., St. L. & C. R. Co., now consolidated with and operated as a part of said appellant company." If there is anything in the articles tending to relieve appellant, it should have been pleaded by appellant. "It would be intolerable that a corporation should, by consolidation, become possessed of all the property, rights and franchises of another company and yet avoid all its obligations, debts and liabilities."

**SECTION SIXTEEN.**

**Coggin v. The Central Railroad & Banking Co., 62 Ga. 685.**

**Consolidation liable at law for injury to constituent's passenger.**

Suit for damages caused by railroad company's negligence in carrying the plaintiff. The suit is brought against the Central Railroad & Banking Company, which latter company did not own the road at the time of the accident but which subsequently, and under authority of act of the legislature,<sup>1</sup> "absorbed the former, and the former voluntarily went out of existence as a corporation." The act made the new company

v. Harvey, 50 Ill. 453. A town, while ing one the plaintiff should aver and not liable for lumber taken by a prove that the defendant is the same visional government, is, of course, corporation under both names. Lang- liable if the town itself converts such borne v. Richmond C. Ry. Co. (Va.) lumber to its own use. City v. Rich- 22 S. E. 357; same case, 19 S. E. 122, ardson, 39 Pacific R. 386. See also reversed in 22 S. E. 159. Each com- White v. City, 27 S. W. 839, and ex- pany is liable at law, but not jointly, amine White v. City, 28 S. W. 1065. after consolidation.

<sup>1</sup> In suit against succeeding corpora- tion for injuries done by the preced-

<sup>2</sup> August, 1872, p. 351.

liable for all of the *contracts* of the other, but was silent as to *torts*. The new company is nevertheless held liable because, first, the word contract is not used in the act in its strict sense, "but in a loose and comprehensive signification as meaning liabilities, without respect to the means by which they arose." Assets of a dissolved corporation can not be withdrawn from the reach of creditors—Code, § 1688—in which section the word debts is used, and there is a strong probability that it was meant to embrace liabilities of all classes, torts included. Those having claims for torts, while not strictly creditors, are within the equity of these statutes; the former company's assets all passed to the defendant and should, in its hands, be as accessible to those whom the former company had wrongfully injured, as to those whom it had promised to pay. And secondly, the defendant may be held liable because the demand is on contract as well as on tort; the injury being caused by not properly carrying the plaintiff as had been undertaken to be done. And it makes no difference that the declaration is in case and not in assumpsit, and that the gravamen is the breach of duty instead of the breach of contract; the forms of action are generally immaterial in this state; the recovery in either would be a bar to another suit, and the measure of damages would be the same.

#### SECTION SEVENTEEN.

**Wabash, St. L. & P. Ry. Co. v. Ham**, 5 S. C. R. 1081; 114 U. S. 587; reversing 15 Federal 763. **Compton v. Wabash, etc.**, 16 N. E. 110, 18 N. E. 380, 45 Ohio St. 592.

**The "Wabash" system is liable for bonds of its constituents, but not as secured.**

The contest over the Wabash consolidation presents a most interesting question, and most striking difference of opinion, Judge Gresham coming to one conclusion, Justice Harlan and Judge Woods agreeing with him therein and refusing a rehearing. The United States Supreme Court, however, reverses them; but thereafter the Supreme Court of Ohio declines to follow the latter's opinion and decides the same question (then before it by another plaintiff) in accordance with the original opinion of Judge Gresham, one judge of the Ohio court dis-

senting. Each of these supreme courts declares that it holds in accordance with the views of the Supreme Court of Indiana.

Brief statements of the views of these courts on this question are as follows:

*Wabash, St. L. & P. Ry. v. Ham*, 5 Supreme Court Reporter 1081, reversing 15 Federal Reporter 763: The Wabash road, defendant, was composed of sundry other roads by consolidation. Plaintiff owned the bonds of one of the constituent companies. It was conceded that prior to the consolidation his bonds were unsecured, but he insisted that because of the consolidation they became a lien upon the property transferred by the said constituent company to the new company.

The statutes under which the consolidations were effected declared, *inter alia*, that all rights of creditors of the constituent companies, and all liens upon the property of such companies should be preserved unimpaired; all debts should attach to the new company as though by it contracted; and that the former companies, so far as relates to their creditors' rights, "may be deemed to be in existence to preserve the same." Plaintiff's contention briefly stated was that by the consolidation his debtor company practically became extinguished, and was succeeded by the new company. Very much like as if an individual dies, becomes bankrupt or makes an assignment; in all of which and similar cases his property is passed to the administrator, or assignee, and from that instant the prior unsecured creditors become secured, that is, their demands attach as liens upon this property; it is from thence on a trust fund. In this contention the plaintiff was fully sustained by the Ohio court (*Compton v. Wabash, etc.*, 16 North Eastern 110), which furthermore likened the case to adoptions under the Roman law, marriages under the old English law, or even to a party becoming a monk, in any of which events the property of the person in question would be turned over to other parties, who, however, from thence on, would hold it in trust for the creditors—the latter, therefore, though formerly unsecured, now becoming thus secured.

The United States Supreme Court, however, declared that the principle contended for applied only upon dissolution, or fraudulent transfers, saying that upon consolidation of two or more solvent corporations under authority of statute, the business of the old corporations is not wound up nor their property

sequestrated or disturbed; the very object is to continue the business. Whether the old are dissolved, or continue in existence with a new name and new power, depends upon the terms of the agreement and statutes. The Ohio statute merged the old corporations in the new, which succeeded to their property and assumed their liabilities and the rights and liens of creditors; thus liens are clearly distinguished from other liabilities.<sup>1</sup>

### SECTION SEVENTEEN (Continued).

#### Comments by the author.

Perhaps we may be pardoned in suggesting that the United States Supreme Court seems to have the better reason. Aside from what this court says, it may be said that the creditor knew when he lent the money that the statute allowed consolidation, and that the company might avail itself thereof; still he was willing to trust it, without exacting security, though the same statute in terms preserves "debts" and "liens." Hence, he knew that on consolidation there might be "debts" and there might be "liens," and he was content with the former. Moreover, it may be observed he loses nothing by the consolidation, he simply gains an additional paymaster. The analogies of the Ohio court would not seem to be applicable, because in all the cases by it supposed, the *corpus* of the estate is passed into other hands for the purpose of being disposed of, *i. e.*, turned into cash and divided among the creditors by short or summary methods, whereas, in the instance under discussion, the new company is formed for quite an opposite purpose.

There was, however, another point in the case, the one on which the decision of Judge Gresham rests, and on which the Ohio Supreme Court coincides with him, but the United States Supreme Court holds adversely, as to which it certainly seems as though the latter court did not have the better reason. That point is, that upon the construing of the various documents

<sup>1</sup> The Ohio Supreme Court cites United States Supreme Court cites from *Indiana*, 16 Ind. 172; 29 Ind. from *Indiana*, 16-172, 29-465, 31-283, 465; *R. R. Co. v. Branch*, 59 Ala. 349 and 41-48. 139, § 809; *Morawetz, Priv. Cor.* The

(too lengthy to be here even analyzed) it appeared that defendant, when receiving the debtor company's property, had agreed to "protect" the plaintiff's bonds. In relation to this the Ohio court<sup>1</sup> says that when property is transferred upon condition that the grantee should pay some third person a debt, or sum of money, the latter acquires an equitable lien upon the property to the extent of the debt or sum which is to be paid to him.<sup>2</sup>

This point is disposed of by the United States Supreme Court very briefly, with the assertion that "protect" meant simply to pay as they mature, as, for instance, when one merchant agrees to protect another's drafts. This view is not entirely satisfactory. As shown in Judge Gresham's opinion, this liability was already upon the new company by virtue of the statute making it liable for the old companies' debt. The lawyers who drew the various contracts undoubtedly were aware of these statutes and can not be supposed to have inserted these stipulations by way of supererogation. It would seem, and sundry other clauses indicate, as though they meant something by them, something additional to the statutory liability; meant what the Ohio court and Judge Gresham say they did.<sup>3</sup>

## SECTION EIGHTEEN.

**Kansas Central Ry. Co. v. Fitzsimmons, 22 Kansas 688.**

**Defendant held liable for injury on its road which is found to have been operated by defendant and not by the construction company.**

The Kansas Central Railway Company is held liable for injuries to a boy by being crushed in a turn-table on its road. The turn-table belonged to defendant and was on defendant's road which was completed in October, 1872, from Leavenworth to Holton, about fifty-six miles. It is claimed, how-

<sup>1</sup> *Compton v. Wabash, etc., Co.*, 16 Heisk. 680; *Van Meters v. Van Meters*, 8 Grat. 148.  
N. E. R. 120.

<sup>2</sup> See masterly treatment of the doctrine by Ranney, J., in *Clyde v. Simpson*, 4 Ohio St. 445; 2 Story's Eq. Jur., §§ 1244, 1246, Pom. Eq. Jur. §§ 166, 1234; *Railroad Co. v. Branch*, 59 Ala. 139; *Hamilton v. Gilbert*, 2  
<sup>3</sup> A most interesting review of the various litigations and of the status of the Wabash property is presented in *Compton v. Jessup*, 68 Fed. Rep. 263-332.



ever, by the defendant, that this road was constructed and operated by a Pennsylvania corporation called "The Washington Improvement Company," having a nominal capital of \$100,000, being 20,000 shares of \$50 each; of which, however, only 500 belonged to individuals, and only five per cent of even these was ever paid into the corporation. Thus the capital was only \$25,000, and the amount actually paid in only \$1,250. There were only three stockholders of said Improvement company. Said road was run in defendant's name, all cars, engines, etc., marked in defendant's name, and all persons did business with the road under that name. The Washington Improvement Company was not known to the public or to parties doing business with the railway. The railway was being operated for business purposes and not mere construction purposes. Therefore, irrespective of what the understanding may have been between the two companies, the jury may have correctly concluded that it was merely a sham for the Improvement company, whose existence is somewhat mythical, to be operating the road. But even if it was really operating the road, yet the jury were justified in finding, if they did so find, that it operated the same not for itself alone, but for the railway company and as its agent and servant, and that therefore the railway company was operating the road through its servant, the Improvement company.

#### SECTION NINETEEN.

**Union Pacific Railway Co. v. McAlpine**, 127 U. S. 805; 9 S. C. R. 286; affirming 23 Federal 168.

**The Union Pacific Ry. Co. takes properties of its constituents subject to equities thereon.**

The Union Pacific Company, composed of the Kansas Pacific and others, takes the property of the Kansas Pacific subject to all rights and equities existing against it. It is found as a fact that such property was subject to a trust, and that the trust would follow it under the circumstances of this case, the defendant having notice thereof, and it is also decided from the language of the articles of consolidation that the property remained subject to "all liens, charges and equities pertaining thereto."

## SECTION TWENTY.

**The Key City, 14 Wall. 658.**

**Consolidation paying for property of constituents only with its own stock, takes property subject to their debts.**

The Northwestern Packet Company, owner of the steamboat Key City, undertook to carry the plaintiff's wheat on that boat and lost the cargo. Thereafter the company consolidated with a rival company, the La Crosse & Minnesota Company; they united their stock in trade, steamboats, barges, and other property, and formed a new corporation under a new name, the stockholders of which were taken exclusively from those in the two old companies, to which company, by appropriate instruments, all the property of the two other companies was transferred. All parties knew that the Northwestern Packet Company was largely indebted, and hence it was arranged that certificates of stock in the new company were issued to the stockholders of that company to the amount of the property received from it, but on their face they recited that no dividends would be paid on such stock until the debts of the Northwestern company should be paid out of the proportion of the net profits, which the stockholders of that company would otherwise be entitled to. The plaintiff, three years and a half after the wheat had been lost, filed a libel in admiralty against the Key City for failure to perform its contract. Libel defeated below, because the lien had been lost by lapse of time, and because of the change of ownership. Decision reversed above.

There is no statute of limitations nor arbitrary or fixed period, the delay which bars the suit depends, in admiralty, on the circumstances of the case. If the vessel has been bought by a purchaser for value without notice of the lien, the defense will be held valid under shorter time. The claimant is not such a purchaser; neither it nor its stockholders, nor the stockholders of the La Crosse & Minnesota Company, have ever parted with or paid any money or other thing of value for the Key City; neither is it apparent nor a reasonable presumption that if the new company has to pay the claim that it will be the loser; but it is nearly certain the loss will fall

where it should, on the stockholders coming in through the Northwestern company; hence the rule for the protection of purchasers without notice is not applicable.

### SECTION TWENTY-ONE.

**The Case of *The Admiral*, 18 Law Reporter 91.**

**Same topic.**

Decided by SPRAGUE, J., was greatly relied upon by claimant's counsel in the last foregoing case as defeating the lien. In that case, after a collision, the vessel was sold to a stock company and stock in the new company given in payment to the former owners; and the court held that as there were other stockholders in the new company who had never owned any share in the vessel, it could not be said that the new company had any notice of the lien; these stockholders took in ignorance of the claim, and ought to be protected; the former owners of the vessel are no longer its owners, they have merely become stockholders, and their knowledge does not affect the corporation with knowledge; the suit is *in rem*, the boat belongs to the corporation and there is no process to reach the interests of the former owners without affecting the interests of others who bought innocently.

The court in deciding the *Key City* case does not refer to the case of *The Admiral* at all, but libellant's counsel calls attention to the fact that in the latter case stress was laid by the court upon the fact that the cause of action was a collision; that the facts were denied and the witnesses dispersed; the purchasers were without notice, and that no provision had been made for the payment of the debts of the former company as there had been in the case of the Northwestern Packet Company.

### SECTION TWENTY-TWO.

**Slattery et al. v. St. Louis & N. O. T. Co., 91 Mo. 217; 4 S. W. 79.**

**Bill against new company dismissed for want of parties; dictum, that it is liable to creditors of old company to amount of assets received and paid for only with stock.**

A transportation company made a written contract with a dispatch company whereby it was provided that the latter

should for five years solicit and obtain freight for the former, and the former should pay the latter ten per cent of all fares received for the same. The plan was followed for not quite a year, during which the dispatch company incurred some \$25,000 expense in establishing agencies, and turned over to the transportation company a vast amount of tonnage, the ten per cent on which would be \$300,000. Thereupon the members of the transportation company organized a new company, and the old company turned over to it all its boats, barges, elevators and other property, and the new company issued \$1,000,000 of its stock, paid up, to the members of the old company; the old company was insolvent, and the new company succeeded to all its rights, property, business and good will. Plaintiffs are the holders of 330 out of the total of 1000 shares of the dispatch company. They allege that the new transportation company was organized, and the property of the old turned over to it in pursuance of a conspiracy to prevent the dispatch company from collecting the said \$25,000 and \$300,000; they allege also that the stockholders of the dispatch company, by resolution, instructed its directors to commence suit for said amounts, but that they refuse so to do and are participants in said conspiracy.

The prayer is for damages and that the property received by the new corporation from the old be declared a trust fund for the payment of the same. The court below sustained a demurrer to the petition; the court above, on the ground that the directors who are alleged to be in default should have been made parties defendant, affirms the judgment without prejudice, and remarks in concluding the opinion that the judges are all agreed that from the statements of the petition the new transportation company is liable for the debts of the old certainly to the full extent of the value of all the property received; and that the plaintiff's remedy is through a receiver to collect the amounts and demands due to the company.<sup>1</sup> The reason why the petition is held defective in not joining as defendants the derelict directors is fully stated. The cause of action accrued to the corporation and the general rule is that the suit should be in its name; there are, however, instances in which, from the necessity of the case, the suit proceeded in the

<sup>1</sup> Rev. Stats., sections 948, 949.

name of the stockholders.<sup>1</sup> The relief is often of a preventative character; the officers have, in many cases, been required to account for the breach of their trust, and parties acting with them have been held responsible, and the property followed into their hands.<sup>2</sup> But in all these cases the defaulting directors were made parties and the suits were primarily against them. The relief, when awarded against other persons, flows incidentally from their complicity with the officers in the wrong complained of. Perhaps if the directors had been joined in this suit they would have given a satisfactory reason for not having brought the suit. They are the proper persons to show why the management should not be taken out of their hands, as must be done to sustain this suit. The case<sup>3</sup> relied on by plaintiff and the citations<sup>4</sup> therein fail to show that in case of right of action for tort or breach of contract the individual stockholder can bring the suit for the recovery in his own name; he must seek his remedy through a receiver appointed to collect the demands due to the corporation.

### SECTION TWENTY-THREE.

**Vilas v. Page, 106 N. Y. 439; 18 N. E. 743.**

**Last consolidation and intermediate companies held to have purchased with notice of plaintiff's equitable lien.**

The plaintiff claiming to own certain rolling stock in use on the Plattsburgh & Montreal railroad, which road was in process of foreclosure, released his rights therein to the receiver of the road; the order under which he made the release provided that in case it should be decided that said property belonged to him, then he should be paid \$18,000, with interest, for said release, and said sum was to be a first lien on the

<sup>1</sup> *Foss v. Harbottle*, 2 Hare 492; 166 U. S. 537, 1 S. C. R. 560; *Hawes Wallworth v. Holt*, 4 Mylne & Co. v. Oakland, 104 U. S. 450.

635; Ang. & A. on Corp. (11th Ed.), § 812; Pom. Eq. Jur., § 1095; *Brewer v. Wakefield Water Works Co.*, L. Boston Theater, 104 Mass. 399; *Peabody v. Flint*, 6 Allen 52; *Robinson v. Smith*, 3 Paige 222; *Pond v. R. R. Co.*, 12 Blatchf. 280; *Detroit v. Dean*, 18 How. 831.

<sup>2</sup> *Peabody v. Flint*, *supra*; *Russell v. Wakefield Water Works Co.*, L. R. 20 Eq. 474.  
<sup>3</sup> *Hawes v. Oakland*, 104 U. S. 450.  
<sup>4</sup> *Samnel v. Halladay*, Woolw. 418;

premises and same, when conveyed by the receiver, were to be conveyed subject thereto. Thereafter the premises were conveyed under said order of sale to Page and others, who, on the same day, conveyed to the Montreal & Plattsburgh Railroad Company a new corporation organized to take the property; subsequently the defendant, the Delaware and Hudson Canal Company purchased the stock of the Montreal & Plattsburgh Railroad Company; it also became the lessee of the defendant to New York & Canada Railroad Company which was organized by the consolidation of several continuous lines of road.<sup>1</sup> These last named companies claim to own the property freed from plaintiff's lien. It is decided, however, that they do not. The general rule is recognized that assets derived from the sale of mortgaged property become, as regards creditors, the substitute for the thing sold; the creditor's claims are transferred to the fund; the purchaser takes the property freed from the same.<sup>2</sup> But this case comes not under that principle.

The intent of the order was to create a lien on the *corpus* of the property. Neither the New York & Canada Railroad Company, nor its lessee, the Delaware & Hudson Canal Company, can claim that the property was freed from the equitable lien created by the order; the rights of all creditors and bondholders were saved by the terms of the acts under which the consolidation took place. It was the evident purpose of the statute that the existing status of each separate company should, as respects creditors and bondholders, remain unimpaired and unaffected by the consolidation. So also, the purchasers at the foreclosure sale are bound by the lien, for it was created under the agreement made by their representatives, of which they also had actual notice. The question is, therefore, narrowed to the Montreal & Plattsburgh Railroad Company, organized for the purpose of taking the title to the property and franchises of its predecessor, the Plattsburgh & Montreal Company. The sale was made to Page and others for, and by them to, the Montreal & Plattsburgh Company, and at the time of purchase Page had actual notice of the order and lien, and recognized it in their agreements, and finally the title which the Montreal & Plattsburgh took from them was no

<sup>1</sup> Under Chapter 917, Laws of 1869.    <sup>2</sup> Railroad Co. v. Howard, 7 Wall. 892.

better than their own, because it paid no value, but represented them simply as purchasers of the bonds of the predecessor road, and hence took the property subject to any equitable lien which was upon it in their hands.

#### SECTION TWENTY-FOUR.

**South Carolina R. R. Co. v. Wilmington, Columbia & Augusta R. R. Co., 7 South Carolina 410.**

**Purchaser on foreclosure liable for part cost of repairs on road by it used, belonging to another company, which company had a contract to that effect with original company.**

Plaintiff company, having constructed and owning a line of railroad, entered into contract with another company to allow it to use nine miles of the same thereof, for which the latter agreed to pay one half of the estimated cost of the construction of said nine miles, and should pay one-half of the repairs.

The defendant company became the purchaser under various mortgage sales of all the property of said latter company, including all its interest under said contract; plaintiff made certain repairs and demands one-half of the cost thereof from defendant; judgment for plaintiff. Affirmed.

“While it may be true that the contract did not directly bind any other persons than the contracting parties, yet indirectly it did, in virtue of certain transactions based upon it, giving rise to relations referred by operation of law to the contract itself for the purpose of making them certain.” It is immaterial that defendants do not claim the use of that part of the road in dispute; they are, as matter of law, invested with the right conferred by the contract, “and the plaintiff’s title in the land and railroad is limited, incumbered by the rights held by the defendants. The rights granted by the contract are not alleged to have been removed or lost by non-user with lapse of time, nor can a disclaimer by plea affect the right of recovery for transactions occurring before it is pleaded.”

Defendants claim that even if bound by the contract they have availed themselves of the right to renounce that which the contract confers and thus escape its obligations. “There is no proof that the rights acquired by the defendants have been restored to the plaintiff or parted with in any manner; for all



that appears, either the defendants or their creditors might make the right of way granted by the contract available if they sought to do so."

Even if some of the mortgages under which defendants claim were made prior to the contract, yet the mortgagees have, under the mortgage, appropriated and disposed of the rights conferred by the contract. "Having asserted their mortgage against rights called into existence subsequent to their mortgages they must take such rights *cum onere*."<sup>1</sup>

### SECTION TWENTY-FIVE.

**Gilman v. Sheboygan & Fond du Lac R. R. Co., 37 Wis. 317.**

**Purchaser on foreclosure not liable for judgment obtained in condemnation proceedings.**

Plaintiff, in 1859, obtained judgment against the Sheboygan & Mississippi Railway Company for damages for land taken by the company under its charter for use of its road; in 1861 the property and franchises of that company were sold under mortgage foreclosure; the purchasers formed a company (the defendant herein) and said company now operates its road over said land. Plaintiff brings this action of debt upon said judgment and seeks to hold liable the new company, alleging that the purchasers at said mortgage sale had notice of its existence and non-payment.

The court finds no ground for liability. It may be that plaintiff, by injunction or some other remedy, could restrain defendant from using his land until the judgment has been paid. The constitutional requirement of payment for condemned property has certainly not been complied with by the mere entry of judgment against an insolvent corporation. But it is sought to hold the new company on the theory that it has seen fit to adopt and ratify the original taking, and therefore is bound to make compensation; but this does not make the new

<sup>1</sup> So, also, a corporation, by acting S. C. R. 188. A purchasing company under a contract, may without formal assignment be held to have assumed the public duties obligatory upon its vendor by way of succession. *Wiggins City v. Topeka, etc.*, 33 Pacific R. 309. *v. O. & M. Ry. Co.*, 142 U. S. 396; 13

company liable for the debts or judgment of the old.<sup>1</sup> The case is the same as where a party purchases property sold on a mortgage; he does not thereby become liable to pay the mortgagor's general debts, though if a prior lien exists it may be enforced.

#### SECTION TWENTY-SIX.

**New York & G. L. R. Co. v. State, 50 N. J. L., 303; 13 Atlantic 1.**

**Purchaser on foreclosure must perform original company's charter duty as to bridges and highway repairs.**

The charter of a company made it obligatory upon the same to keep in repair bridges on the highway where crossed by its road. Mortgage and foreclosure resulted in placing the road in the hands of the defendant, which was incorporated for the purpose of obtaining the road. The court holds the defendant liable to keep the bridges in repair; it has taken the property with the burdens which were attached to it in the hands of the original company; the court also finds the same duty upon the defendant under the general statutes.

#### SECTION TWENTY-SEVEN.

**Lefurgy v. New York & N. R. Co., 8 N. Y. Supp. 302.**

**Purchaser on foreclosure must restore stream diverted by the original company.**

A stream crossed by two railroad bridges was nevertheless allowed to flow in its ancient channel, until in 1880 the New York City & Northern Railroad Company so dug a ditch as to divert the water. This road was sold on foreclosure in 1887 to the defendant, the New York & Northern Railroad Company, and as such diversion of the water proved injurious to plaintiff subsequent to said sale, plaintiff asked for a man-

<sup>1</sup> Vilas v. M. & P. du C. Ry. Co., 17 Wis. 498; Smith v. C. & N. W. Ry. Co., 18 Id. 17; Wright v. M. & St. P. Ry. Co., 25 Id. 46. Distinguishing one should apply to the court which appointed the receiver. Brockert v. L. C. R. Co. (Iowa), 61 N. W. 405.

damus upon defendant to compel it to restore the waters to their ancient channel. Mandamus was awarded; following a prior case<sup>1</sup> as an authority that defendants may be held for injuries now taking place, though the original acts from which they spring were performed by the predecessor in title. If the duty to restore the diverted stream could be avoided by a transfer of ownership, the rights of the landowners would be much imperiled. The duty is transferred with the property.

### SECTION TWENTY-EIGHT.

**Gulf C. & S. F. Ry. Co. v. Newell, 73 Tex. 834; 11 S. W. 842.**

**Purchaser on foreclosure is not bound by a contract for maintenance of a depot.**

Plaintiff had a contract with a railroad company whereby it agreed to maintain a depot at a certain place, but failed to do so. The road was thereafter sold on judgment and execution to a new company, the defendant, and plaintiff sought to hold this new company liable for his damages by reason of said depot not being maintained. Buying the property does not create a consolidation; this could be done only by consent of the state and stockholders.<sup>2</sup>

Moreover, the defendant is not liable by reason of any consolidation, for none is alleged or proved; nor is it liable under contract, for it never assumed any; nor is the property which it bought subject to any lien in plaintiff's favor, as the obligation was purely a personal one.<sup>3</sup> The defendant is not estopped from denying the consolidation; plaintiff has never done any act in reliance thereon.

<sup>1</sup> *Brown v. Railroad Company*, 12 Ch. 118; *Dougan's Case*. L. R. 8, Ch. N. Y. 486. 540.

<sup>2</sup> *Pearce v. R. R. Co.*, 21 How. 442; <sup>3</sup> *City of Menasha v. R. R. Co.*, 52 State v. Bailey, 16 Ind. 46; *Turtle v. Wis. 420*; 9 N. W. R. 396; *Wright v. R. R. Co.*, 35 Mich. 247; *Mowrey v. Ry. Co.*, 25 Wis. 46; *Sappington v. R. R. Co.*, 4 Biss. 78; *Turnpike Co. v. Ry. Co.*, 37 Ark. 28; *R. R. Co. v. Barnes*, 42 Ind. 498; *Bishop v. Brain- Judge*, 44 Mich. 479; 7 N. W. R. 65; *erd*, 28 Conn. 288; *Taylor, Corp.*, § 419 *Hammond v. Ry. Co.*, 16 S. C. 578. *et seq*; *Mor.*, Priv. Cor., 544; 1 Ror. R. Grantee in recorded deed agreeing to R. 588; *R. R. Co. v. Shirley*, 54 keep up gates, a subsequent foreclos- Tex. 125; *R. R. Co. v. Fryer*, 56 Tex. ure purchaser is bound so to do. To- 609; *Clinch v. Corporation*, L. R. 4, led, etc., v. Cosand, (Ind.) 33 N. E.

## SECTION TWENTY-NINE.

**People v. Louisville & Nashville Railroad Co., 120 Ill. 48; 10 N. E. 657.**

**Purchaser on foreclosure must, on account of general duty to public, stop trains at point in question, but is not bound by the original company's agreement to that effect.**

Donation was voted to a railroad company upon the condition that it should erect and forever maintain a depot at McLeansborough and stop all trains there. This road was consolidated with others; the consolidated road was mortgaged; the mortgage foreclosed; the property bid in by representatives of the bondholders, who transferred it to a company created to take it for the bondholders, which company leased the road to the defendant company, and this last company refused to comply with said condition as to stoppage of trains. Compliance was enforced by mandamus. The first contention of the petitioner was that the condition upon which the donation was made was obligatory upon the last purchaser and the lessee thereof. The court, however, rules this point against the petitioner, saying in effect, it is not contended, nor is there any ground for such contention, that said condition is anything in the nature of a covenant running with the land; the contracts and stipulations in question have not the slightest reference to the purchase or sale of land; they are in no sense a contract about land or any interest therein.<sup>1</sup> Petitioner further contends that the purchaser had notice of the contracts from the public records, and that the same having been expressly authorized by the original charters, became obligatory upon the subsequent purchasers. This authorization, however, makes no difference, because it is merely to empower the corporation to do what individuals could do without authorization. Nor does the record cut any figure, if no obligation binding subsequent purchasers arises therefrom. The

251, and a subsequent purchaser must of way. *Dickey v. K. C., etc., Co.*, 20 build the road or give up the land, S. W. 685; see also *Dallas, etc. v. Mad-deed* being so conditioned. *Savannah, etc., Co. v. Atkinson* (Ga.), 21 S. E. 1010. The succeeding company is not bound to honor a life pass issued by its vendor in obtaining the right

<sup>1</sup> The defendant's brief cites hereon *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 94 Ill. 83.

county's condition imposed upon the company became nothing more than the personal obligation of the latter, subject to be rendered unavailing by the insolvency thereof and by the judicial or foreclosure sale of its property, the same as any other personal debt might be.<sup>1</sup> The county should have taken security for the performance of the obligation, if unwilling to trust the continued solvency and existence of the obligor (*i. e.*, the original company, or also the consolidated company which assumed the obligation).

On the other point raised, the court compels the company to stop its passenger trains at McLeansborough, it being a county seat;<sup>2</sup> nor can the defendant change its location so that said place will be no longer the terminus; the locating of a terminus once for all fixes it and makes the original or any subsequent company's power in this respect *functus officio*;<sup>3</sup> and again, on common law principles, the company is compelled to stop a sufficient number of trains to meet the demands of public convenience and business necessities. The location of the depot indicated the necessity for it, and no doubt business interests have grown up and shaped themselves in reference thereto and reliance thereon. Mandamus awarded; Scott, C. J., and Sheldon and Craig, JJ., dissent.

In the first decision of this same case<sup>4</sup> the mandamus was denied. The opinion holding then, as in the second decision, that the condition of the donation created no lien,<sup>5</sup> and hold-

<sup>1</sup> The report of this case in 10 North-eastern Reporter, 657, contains comprehensive extracts and the authorities from the briefs in the case, in which the following are cited in the railroad's brief, upon the proposition that the company which purchased the road on the foreclosure sale, is not in any manner bound by any contract of the mortgagor road, save such as were paramount to the deed of trust under which the road was sold:

Co., 25 Ill. 353; People v. Chicago & N. W. Ry. Co., 57 Ill. 440; Stewart's Appeal, 72 Pa. St. 291; Vilas v. Milwaukee & P. du C. Ry. Co., 17 Wis. 497; Smith v. Chicago & N. W. Ry. Co., 18 Wis. 17; Wright v. Milwaukee & St. P. Ry. Co., 25 Wis. 46; Gilman v. Sheboygan & F. du L. R. Co., 37 Wis. 87; Com. v. Central Pass. Ry. Co., 52 Pa. St. 506.

<sup>2</sup> Sec. 88, Ch. 114, Rev. St., Starr & C. Ed.

<sup>3</sup> Pierce, R. R., 254, 255.

<sup>4</sup> 5 N. E. Reporter 379.

<sup>5</sup> Morgan v. Thomas, 76 Ill. 120; Wiggins Ferry Co. v. Ohio & M. Ry. Co., 94 Ill. 83; City of Menasha v. Milwaukee & N. R. Co., 52 Wis. 414; S. C., 9 N. W. R. 396.

Ellis v. Boston, etc., R. Co., 107 Mass. 1; Newport, etc., Bridge Co. v. Douglass, 12 Bush. 673; Morgan Co. v. Thomas, 76 Ill. 120; Springfield & I. S. E. Ry. Co. v. County Clerk, 74 Ill. 27; Bruffet v. Great Western Ry.

ing also that the charter obligation of the defendant's lessor to run trains *to* and *from* McLeansborough was complied with by running to and from the limits thereof, and that the trains need not be run to the depot. Mandamus refused. Scott and Scholfield, JJ., dissent.

### SECTION THIRTY.

**People v. Rome, Watertown & Ogdensburg R. R. Co.**, 103 N. Y. 95; 8 N. E. 369.

**Condition of a donation requiring stoppage of train at certain point is not a charge on the property after foreclosure sale.**

The Syracuse and Northern Railroad Company, as a condition of a donation, was obliged to run its trains to, and make stops in, Pulaski and Sandy Creek. This road was sold on foreclosure, and a new company organized under the same name became the owner. This new company was consolidated with the Rome, Watertown & Ogdensburg Railroad Company, which consolidation, under the last name, took possession of all the roads and operated them, but abandoned the portions at Pulaski and Sandy Creek. Mandamus is brought by the attorney-general to require the last named company to resume the said stations. Mandamus granted in the lower courts, but ruling reversed in the appellate. Attention is called to the fact that the petition is by the attorney-general, in behalf of the people, hence the court should not grant a mandamus unless the rights of so considerable a number are affected as that it can be that there is a public right to protect or a public duty to enforce.

The attorney-general, acting in behalf of the people of the state, would not be the proper prosecutor in a proceeding to enforce a contract supposed to have been entered into between a town and a railroad company. The defendant never undertook to perform the contract in question; it was not a charge or lien upon the property of the mortgagor company; it did not pass by the foreclosure sale, nor devolve upon the purchaser thereunder. The towns in question being sufficiently and reasonably accommodated by new arrangements made for them by defendant, and the road being really operated between defendant's *termini* as required by its charter, by

the authorities cited<sup>1</sup> it follows that the towns are not entitled, as a matter of public interest, to anything more. There may, however, be cases where a consolidated company, having acquired two lines running between the same *termini* but through different sections, should be required to continue the operation of both lines; the public interests and the accommodation of a large portion of the people might require it; but where all are as well accommodated by one line as by two, the defendant should not be compelled by mandamus to operate both at a great sacrifice of money upon the fanciful idea that the sovereignty of the state is wounded by the omission to operate one of them. All concur except Andrews, J., taking no part, and Miller, J., absent.

#### SECTION THIRTY-ONE.

**Town of Plainview v. Winona, etc., Co.; Town of Elgin v. Same, 36 Minn. 505; 32 N. W. 745, 749.**

**A purchasing company is made liable by statute for the original company's debts.**

The Plainview Railway Company received bonds from the town of Plainview and sold the same. The bonds having afterward been held valid in the hands of innocent holders and the town having paid them, it is held that the town has a good cause of action against the company for the amount paid; and said company having sold its road to and been succeeded by the Winona & St. Peter Railroad, the latter road is also liable, inasmuch as it made the purchase "subject to all demands, claims and rights of action against said Plainview company, arising out of the latter company having heretofore obtained and disposed of certain bonds and coupons purporting to have been issued by the towns of Plainview and Elgin to said Plainview Railroad Company." <sup>2</sup>

<sup>1</sup> Farmers L. & T. Co. v. Henning, v. R. R. Co., 2 Barn. & Ald. 646; 17 Am. L. Reg. (N. S.) 266; State v. People v. A. & V. R. Co., 24 N. Y. H. & N. H. R. Co., 29 Conn. 538; U. 261.  
P. R. Co. v. Hall, 91 U. S. 343; King <sup>2</sup> Sp. Laws, 1881, Ch. 414.



## SECTION THIRTY-TWO.

**Chicago, St. P., M. & O. Ry. Co. v. Lundstrum, 16 Neb. 254; 20 N. W. 198.**

**The purchasing company is liable for a death loss occurring prior to the purchase.**

An employe of the Sioux City Railway Company having been killed in such a manner as would make that company liable for his death, it is held that the Chicago, St. Paul, M. & O. Ry. Co., which bought the former company's road, can be held for such liability; the trial was had directly against the purchasing company. The acts prior to 1881 are construed as limiting the sales of railroads to companies organized within the state. The act of 1881 is the only one under which the defendant can be supposed to have bought the road; prior to that, foreign companies, though invited to build to or through the state, yet had never been invited to buy out roads already built. The deed of sale, though dated twenty-one days prior to the time the act of 1881 went into effect, yet was evidently made in view of said act becoming a law. Said act provides that "the purchaser of any such railroad shall be subject to any and all laws (liens), incumbrances or indebtedness existing against the railroad company from which such road may be so purchased." The word "indebtedness" is used in its large and general sense, and not in a technical one. Webster gives as its primary definition, "Placed in debt; being under obligation; held to payment or requital; beholden."

The purchaser therefore took the road charged with the payment of any just claims which were outstanding against the road, or its former owners as such, including that of the plaintiff in error, or his decedent, if such claim be found just.

## SECTION THIRTY-THREE.

**Whipple v. Union Pacific Ry. Co., 28 Kansas 475.**

**Plaintiff defeated because consolidation never assumed the liability, and original company was not brought into court.**

Action by plaintiff to recover for personal injuries. Defendant is named as "Union Pacific Railway Company, Kansas

Division, formerly Kansas Pacific Railway Company." Injuries were done August 2, 1879, suit commenced June 15, 1880. Facts are, that on date of the injury the Kansas Pacific Railway Company, a Kansas corporation, was operating the road. On January 24, 1880, it was consolidated with the Union Pacific Railway Company and the Denver Pacific Railroad & Telegraph Company, and by such consolidation became merged in the Union Pacific Railway Company. The consolidated company thereafter operated the road. The validity of this consolidation is not properly raised on the record. There is no such corporation as the "Union Pacific Railway, Kansas Division" nor "Union Pacific Railway, formerly Kansas Pacific Railway Company." There was and is a Kansas Pacific Railway Company, and whether said consolidation is valid or not, this constituent company's name remains as it was. If the consolidation is valid it has a legal existence and its own corporate name; but if invalid, it does not work a change in the name of the constituent company; the effect is simply that the constituent company has pretermitted the discharge of its corporate functions and duties in favor of an irregular association. In no event has there been a change in, or attempt or intent to change, the name of the Kansas Pacific Railway Company. The style of defendant's name in the petition implies an identity of corporation with mere change of name; but whether the consolidation is validly organized or not, the names of the constituent companies remain unchanged.

The consolidated company is evidently meant to be the defendant; whether a *de facto* or *de jure* corporation it did not do the injury complained of, and can be held liable, if at all, only by provisions of the agreement of consolidation which declares that the new company does not assume any individual liability for the debts, etc., of the constituent companies and declares that the constituent companies shall preserve their existence as respects their debts, obligations and liabilities; that their property comes to the consolidated corporation subject to all liens, mortgages and equities, and that nothing in the agreement shall prevent any valid debt, obligation or liability of either constituent company from being enforced against the property of the proper constituent company which becomes the property of the consolidation.

Thus the consolidated company has no right to adjust the

unliquidated demands of the constituent company; it is not agent for such purpose. The constituent company has a right to be heard before any unliquidated demand against it is adjusted and paid out of the property which it has turned over to the consolidated company.

Furthermore, a judgment, if obtained in this action, would conclusively bind all of the defendant's property in Kansas and elsewhere; which is not justified by the consolidation agreement.

Clearly, the Kansas Pacific Railway Company must first be sued at law; if the consolidation is invalid, then said company remains as it was before for purposes of suit or any other; and if the consolidation is valid, still that company's existence is preserved for the very purpose of adjusting its liabilities. After a common law judgment shall have been thus obtained, the property may be followed into whosoever hands it passed and equity will lend its aid, if necessary. This view is not affected by the suggestion that said company can no longer be reached for suit; if summons be issued it may be that some official be found on whom to serve; or that its accumulated property can be attached as that of an absconding or concealed debtor,<sup>1</sup> or sequestered by the state in its visitatorial power for the discharge of its liabilities.

#### SECTION THIRTY-FOUR.

**Troy & Boston R. R. Co. v. The Boston, H. T. & W. Ry. Co., 86 N. Y. 107.**

**Lessee's remedy is by ejectment and not in equity against its lessor's grantee retaking possession, claiming the lease to be void.**

Equity will not interfere to restrain lessor's grantee from entering upon the road bed and tearing up complainant's tracks where complainant claims to hold under a lease which was made without authority, and especially not, where, as in this case, complainant has an ample remedy at law by ejectment,

<sup>1</sup> This is declared to be a mere dictum; in a case holding that a township which fails to elect its officials so that no summons can be served upon it, does not thereby become subject to service by publication; it does not conceal itself. *Brockway v. Oswego Township (Kansas)*, 4 *Pacific Reporter* 79.

and shows no equity at all in its demand for the road, as it admits it does not want the road for the purpose of completing its construction, or otherwise making it available for public use.<sup>1</sup>

### SECTION THIRTY-FIVE.

**The Pittsburgh, etc., Co. v. Bolner, 57 Indiana 572.**

**Defendant can be held for killing stock on another company's road only when brought within terms of the statute.**

Action to recover value of stock killed on an unfenced railroad track by a train of the defendant company. Judgment for plaintiff reversed.

Defendant offered to prove that at the time of the killing it was not the owner of the road, but the same was then "and still is owned by the Columbus, Chicago & Indiana Central Railway Company, and this defendant was not, at the time of the killing of said animals, running and controlling said railroad in the name of the said Columbus, Chicago & Indiana Central Railway Company, but in the name of this defendant;" which evidence was excluded.

Plaintiff's cause of action is purely statutory; it holds that lessees, assignees, receivers and other persons running or controlling any railroad in the corporate name of such company, shall be liable jointly or severally with such company; the evidence offered should have been admitted; it would, if true, have shown that the case did not come under the statute, because defendant was running the road in its own corporate name and not in the name of the owner; it is only the lessee who does the latter who is made liable.<sup>2</sup>

<sup>1</sup> The Troy and Boston R. R. Co. v. The Boston, H. T. & W. Ry. Co., 86 N. Y. 107, containing exhaustive and valuable opinion and briefs.

<sup>2</sup> The Cincinnati, etc., R. R. Co. v. Paskins, 36 Ind. 380; The Cincinnati, etc., R. R. Co. v. Townsend, 39 Ind. 38.

## SECTION THIRTY-SIX.

**City of Menasha v. Milwaukee & Northern R. R. Co., 52 Wis. 414;  
9 N. W. 896.**

**If purchase was on foreclosure, defendant is not bound by original company's agreement not to extend track; and if defendant's organization is fraudulent, the remedy is at law.**

Injunction granted (on bill and answer) on complaint of city of Menasha, restraining "the Milwaukee & Northern Railroad Company" from extending its track through a certain portion of the city; the supreme court reverses the case, holding that it was error to grant the injunction.

The city had made a contract with the Milwaukee & Northern Railway Company, whereby the latter agreed not to extend its track through said portion, and it was to enforce this agreement that the suit was brought.

Bill charged that the defendant first named was merely the successor of the other, its organization delusive, and made for the mere purpose of building the track in avoidance of said contract. All of which was duly denied by the answer of the appellant, which alleged also that it was organized in good faith for the purpose of purchasing the former company's road on a foreclosure sale, and for building a road, and that it made such purchase; that it had no knowledge of said agreement; that it was about to build a line of its own through said village to connect with the part purchased, and that the former company's stockholders had ceased to elect officers, and had abandoned their investments therein.

The injunction should have been dissolved. If appellant was in good faith organized, and bought the other company's road at foreclosure, it need not abide by the other company's contracts.<sup>1</sup> It is not the assignee nor successor of that company, and not bound by its personal contract, which is not a lien on the mortgaged property. Appellant was not organized<sup>2</sup> as assignee of the old company, but as a company with power to buy and build roads,<sup>3</sup> and it may exercise these powers, though it thus indirectly avoids the contract in question.

<sup>1</sup> Wright v. M. & St. P. Ry. Co., 25 Wis. 46-53.

<sup>2</sup> Rev. Stat., 1878, § 1788.

<sup>3</sup> Rev. Stat., 1878, § 1820.

If the organization of the new company was, however, as alleged, fraudulent and delusive, the city's remedy is ample at law; equity can not interfere; the answer positively denies all the allegations of the bill, and as the pleadings stand there is no sufficient ground for granting an injunction. So far as the public interests are concerned, they will not be prejudiced by the building of the line in controversy.

#### SECTION THIRTY-SEVEN.

**The Central R. R. Co. v. Brinson, 64 Ga. 475.**

**Defendant, sued as for injury on its own road, can not be held on proof that injury happened on another road, even if relation of lessor and lessee existed.**

Suit for damages for crushing plaintiff's foot. The declaration charges that the defendant, The Central Railroad and Banking Company, caused the injury by its carelessness in running a certain train *over their road in said county*, but the proof showed that the injury was done on the Augusta & Savannah Road. The lower court refused to instruct as prayed by defendant, to the effect that plaintiff could not recover if the proofs satisfied the jury that the accident happened on the line of the Augusta & Savannah Railroad, "the two corporations being separate and distinct." This refusal is held to have been erroneous. "These railroads are two separate and distinct legal entities, passing over and occupying different parts of the territory of Barbe, and suits against them should recognize that fact; although the one may be leased to and operated by the other, thereby making itself responsible upon the road which is leased, yet neither loses its identity, and any tort committed on the one or the other should be so alleged and proved."

#### SECTION THIRTY-EIGHT.

##### **Sundry instances.**

Change from state to national bank is a transition and not a new corporate creation; the latter is directly liable for the former's debts. *Coffey v. Bank*, 46 Mo. 140, 143.

When a statute preserves the rights of creditors and declares

that the president of the consolidated corporation shall, for purposes of service of process, be deemed the president of each constituent, the consolidation may be directly sued, although he might also have sued the old, and after judgment brought creditor's bill.

The law abhors a circuitry of action. *Warren v. Mobile, etc., R. Co.*, 49 Ala. 582.

Notes made by the constituent company may be sued upon directly against the consolidated company. *Columbus, etc., Ry. Co. v. Skidmore*, 69 Ill. 566.

After consolidation, suit must be against the new corporation; it is a nullity against the old. *Indianola, etc., R. R. Co. v. Fryer*, 56 Texas 609.

Under statute requiring consolidation to pay all judgments for work and labor, debt will lie against it on a judgment obtained against the constituent. *St. Louis, etc., R. R. Co. v. Miller*, 43 Ill. 199.

A pending suit does not abate by consolidation; the corporation does not die, but lives in the new one, which must attend the suit and answer the judgment. *Baltimore, etc., Co. v. Musselman*, 2 Grant Cas. 348.

When the consolidation appears, or is brought in, all the prior pleadings of the constituent become its own. *Louisville E. & St. L. C. R. Co. v. Utz (Ind.)*, 32 N. E. 881.

After judgment the consolidation is to be brought in on *scire facias*, very much like at common law. A suit pending at time of marriage proceeds against the wife until judgment, and then the husband is by *scire facias* made party to the judgment. *Shackelford v. Miss. Cen. R. Co.*, 52 Miss. 159.

A consolidation pending a suit, should be brought to attention of court at once; it is not available in arrest of judgment. *East Tenn., etc., R. Co. v. Evans*, 6 Heisk. 607.

The courts do not take judicial notice of a consolidation having been effected; it must be proved in a suit against the consolidated company for services rendered to a constituent company. *Southgate v. Atchison, etc., Co.*, 61 Mo. 90.

It is sufficient, however, to aver the fact of authority to consolidate, and that they did consolidate; it would be a great hardship upon the plaintiff, not having possession of the books and records, to compel him to set out all the steps and details



taken in consolidating. *Collins v. Chicago, etc., R. Co.*, 14 Wis. 492.

But the terms, dates, provisions, facts and particulars of the statute of a foreign state, under which consolidation has been made, must be set forth in a plea alleging that a mortgagee railroad had been consolidated. *Hubbard v. Chappel*, 14 Ind. 601.

A lessee company holding under a ninety-nine year lease is the "proprietor" in the meaning of the statute and liable for damages by fire set by its engine. *Pierce v. Concord*, 51 N. H. 593.

The lessee is liable for injuries done by persons under its control, but not by others. *Sprague v. Smith*, 20 Vt. 421.

The lessor and lessee companies are jointly liable for injuries done by the lessee. *Pennsylvania Co. v. Ellett*, 132 Ill. 654.

A consolidation of two boom companies must, nevertheless, maintain the separate booms and deliver logs at each as required in the original charters. *Gould v. Langdon*, 43 Pa. St. 367.

Three companies separately mortgage their roads, and then consolidate; the decree of foreclosure is to sell the roads in their entirety, and then to make equitable distribution of the proceeds among the several mortgagees. *Gilbert v. Wash. City, etc., Ry. Co.*, 33 Gratt. 586, 611.

An agreement made when purchasing right of way to protect land from overflow, is personal to the company making it and not obligatory upon a later company which buys the road. *Sappington v. Little Rock, etc., Co.*, 37 Ark. 23.

## CHAPTER XV.

## RIGHTS OF THE ORIGINAL CORPORATION.

The rights of the original corporation are not lost by the exercise of any acts which might have been expected to occur by virtue of existing laws; thus the right to a tax voted to a corporation is not lost by its consolidation (according to statute) with another, provided adequate protection is given to the subscribers or tax payers that they receive what they are entitled to.

Nor are the subscribers released by the sale of the road, or portion of it; if the sale is unauthorized the courts will not recognize it; and if authorized, then it was but a contingency which the parties must have expected might occur; a radical, or fundamental change, however, in the plan or business of the enterprise, or in its scope, purpose or location, made without the consent of the subscribers, will release them.

There is a distinction between transferring, as by sale, consolidation or lease, the enterprise itself to other hands, keeping it, however, the same in its details, and substantially changing without the subscriber's consent, the details of the enterprise itself; in the former event the subscriber is not released; in the latter he is, irrespective of whether there has or has not been a transfer.

The decisions rest mostly upon statutes which, by their terms, fix the respective rights of the original corporation or its successor in interest under consolidation, sale or lease, as the case may be; but in the absence of a controlling statute the rights, privileges and franchises secured to the original company remain to it, even after foreclosure, or sale or lease (excepting to the extent that they were included in the transfer), so long as they are not at the instance of the state determined by judicial proceeding, *i. e.*, forfeited by reason of non-user, failure to comply with conditions imposed upon them, or other sufficient cause.

## SECTION ONE.

**Cantillon v. The Dubuque and North Western Railway Company, 78 Iowa 48; 42 N. W. R. 618.<sup>1</sup>**

**A railway corporation does not, by consolidation, lose its right to a voted tax.**

A tax having been voted to a railway corporation, it, thereafter, by sale and consolidation, became joined with two other corporations. It is held that the right to collect the tax is not thereby lost.

Following is the opinion in full:

GRANGER, J. This case is before us on rehearing, an opinion being filed, affirming the judgment of the district court. At the former hearing, the case was disposed of under the rulings in *Manning v. Mathews*, 66 Iowa 675, *Blunt v. Carpenter*, 68 Iowa, 265, and *Barthel v. Meader*, 72 Iowa, 125, the rule in such cases being that the alienation of the road before completion, and after taxes voted in aid of its construction, works a forfeiture of the tax. Defendant urges upon the attention of the court, the consideration that this case is distinguishable from those cited by its facts as to the alleged sale. In the cases referred to there was, after the voting of the tax, either an absolute sale of the road, or what amounted to a lease in perpetuity, and, for all practical purposes to the taxpayer, an absolute sale. The holdings in such cases are based on the theory that the payment of the tax is upon contract that the taxpayer shall have an interest in the property he helped to create; and that for the company to voluntarily place the road beyond its power to give such interest avoids the obligation for payment. After a careful consideration of the law and arguments, we are convinced that this case is distinguishable from the others as to its facts, and controlled by a different rule of law. The aid to the defendant company was voted December 20, 1883.

On the fifth of May, thereafter, the defendant company, which, for convenience, we will denominate (as it is in the

<sup>1</sup> Rehearing, reversing contrary decisions of same case, reported in 85 N. W. R. 620.

record) "The Dubuque Company," entered into two agreements, one with the Minnesota Loan and Debenture Company, by the terms of which the latter company was to construct for the Dubuque Company its line of railroad for fifty miles; and one with the Minnesota & Northwestern Railroad Company, by the terms of which, after the Dubuque Company should complete its fifty miles of road, the lines of the two companies should be joined so as to constitute a single line of road, and their corporate interests should be consolidated. This agreement by the Dubuque Company received the assent of its board of directors, but not of the stockholders. There is no doubt in our minds, but that from May 5, 1884, it was the purpose of the officers of the Dubuque Company to make the consolidation when the fifty miles of road was completed, which was in fact done. On the thirteenth of December, 1886, and just after the completion of the fifty miles of road by the Dubuque Company, the Dubuque Company and the Minnesota & Northwestern Railroad Company entered into two contracts. (1) One, by the terms of which the contract of May 5, 1884, was abrogated; and (2) one, by the terms of which the two lines of road were united, and the two companies consolidated in such manner that the consolidated line came under the control and management of the Minnesota & Northwestern Railroad Company. In fact, for the purpose of this case, it may be said to have been an absolute sale of the road to the managing company. In the contract of May 5, 1884, there was no agreement by which the purchasing company was to issue the certificates for stock due on payment of taxes voted. In the contract of December 13, 1886, there was an agreement that such tax payers should have the stock in the roads, as consolidated.

I. These facts are sufficiently full for the presentation of our views on this question. As we understand, it is the claim of appellees that the mere fact of the sale of the road operates to avoid the tax, regardless of the fact of whether or not the tax payer would be entitled to his certificates of stock from the purchasing company owning the line aided by the tax. The right of railroad companies to transfer their rights and franchises is so well understood, and so clearly provided for by statute, that no citation in that respect is necessary. If appellant's theory, that a company aided by such a tax may, before the completion of its road, transfer it to another com-

pany, and still preserve its right to the tax, has support in the statute, it is by virtue of section 1302 of the Code, which reads as follows: "Where any railway company shall be organized under a corporate name, and shall have made contracts for payments to it upon delivery of stock in such companies, and shall, subsequent to such contracts, have changed its corporate name, or when the real ownership in the property, rights, powers and franchises have passed, legally, equitably, into any other company, no such contracts shall be enforced in law or equity until tender or delivery of stock in such last named corporation or company." This section has not heretofore received judicial construction, and we must express a regret that the legislative purpose is not more apparent than it seems to be. It, however, is clearly apparent that cases are contemplated, where payments are to be made to the company upon delivery of stock in the company, and it is equally clear that it contemplates that the ownership of the property, rights, powers and franchises may legally pass to another company, while such contracts for payments exist; but such contracts are not enforceable without tender or delivery of stock in the company having the ownership of the property, etc. To our minds two queries are presented: (1) Does the section embrace obligations for payment of taxes voted as in this case? and (2) does it embrace voluntary conveyances by one company to another? As to the first, the letter of law makes it applicable to contracts for payments upon delivery of stock.

Counsel in this case agree, and we have held, that the obligations of the taxpayer in such cases arise on contract; and the obligation for payment is dependent upon the delivery of stock. Acts 20th Gen. Assem., Ch. 159. The language of the law as to contracts is general, and we see no reason for excluding from its operation this class of contracts. As to the second query, the language of the law is also very general. It speaks of cases where the ownership legally passes to another company. It is sufficiently broad to include voluntary and involuntary conveyances. At the first reading there was something of a hesitancy in giving to the section so broad a meaning, but the rules for construction and our reflections lead us to the conviction that nothing less was designed. In argument, no reasons are suggested against such a construction, and none whatever occurs to us. With this view of the law,

it is plain that the case is distinguishable by its facts from those on which the former opinion was based. The parties must be held to a knowledge of the law at the time the tax was voted, and that the company had the right to transfer the road, and that thereafter the obligation for payment would depend upon the readiness of the purchasing company to deliver the stock. We do not leave out of view in this case the fact that by the agreement of May 5, 1884, there was no provision in the contract of sale for the purchasing company delivering the stock. There are many doubts surrounding the validity of that sale, but with our view we think it unnecessary to determine them. We may say it was a valid sale. Looking to the same section, we do not find a requirement that in making the sale the delivery of this stock shall be provided for; and it is of no concern to the taxpayer whether such a provision is made as between the companies or not. The law exempts the taxpayer from payment unless the stock is forthcoming. By the contract of sale December 13, 1886, provision is made for the stock in the consolidated line, and the evidence clearly shows that it is of greater market value than it would be in the former road. Considered in the light of pecuniary advantage, the transfer was greatly to the interest of the taxpayers, and hence they are without any special claims to equitable consideration.

II. The tax was voted December 20, 1883. The levy was made September 30, 1884, after the levy of the taxes for that year for state and county purposes; the levy for state and county purposes being made on the assessment of 1884. That for the railroad tax was levied on the assessment of 1883; the appellees insist that the tax is void for that reason. It is appellees' contention that the board of supervisors having used the assessment of 1883 for the levy of taxes in September of that year, and the tax list having passed to the treasurer for collection, the assessment had served its full purpose, and that it could not be made the basis of a levy in 1884. After a township has voted aid to a railroad company, the law makes it the duty of the township clerk or the clerk of elections to certify the facts to the county auditor, who shall at once cause such certificate to be recorded in the office of the county recorder. And then follows this provision:

“ When such certificates shall have been made and recorded, the board of supervisors of the county shall, at the time of

levying the ordinary taxes next following, levy such taxes as are voted under the provisions of this act as shown by said certificate, and cause the same to be placed on the tax lists of the proper township, incorporated city, or town, indicating in their order thereupon when and in what proportion the same are to be collected, and upon what conditions the same are to be paid to the railroad companies; a certified copy of which said order shall accompany the tax lists. Said taxes shall be collected at the time or times specified in said order, in the same manner, and subject to the same laws, after they are collectible, as other taxes, or as may be stated in the petition and notices for the election." Acts 20th Gen. Assem., Ch. 159, Sec. 3.

The foregoing is our only statutory guide as to the assessment on which to make the levy. We do not accept the theory of appellees, that the levy of taxes for 1883, for general purposes, having been made on the assessment for that year, the same assessment could not be used for another levy; that is, we see no reason why, after one levy is made, the same may not be used for another levy, if the law so designed. The assessment for the year which the law really contemplates is but the instrument of means for measuring or ascertaining the amount of the individual's indebtedness to the company, as he is to pay five per cent of the assessed valuation of his property. The extent of such an obligation may be measured by the assessment of any year the law may designate or the parties agree upon, and the fact that the assessment has once been used would make no difference. We say this much only in answer to a claim that an assessment can only be used as the basis of a levy for a single year. Appellant's theory is that, the tax being voted in December, 1883, the law contemplates a levy on the assessment for that year; that both the company and the taxpayer know what the assessment is, and contract with knowledge of the amount to be paid by the one and received by the other; while, if the levy is to be on a future assessment, they make their contract in ignorance of so important a consideration. If this thought is to be a controlling one, we experience a difficulty in fixing a time to serve as a dividing line between levies on past or future assessments. In the case of *Parons v. Childs*, 36 Iowa 108, the court had under consideration the question of which of two assessments was the



proper one for the levy where taxes had been voted to aid the construction of a railroad. In that case the aid was voted March 30, 1869, and the court held that the levy should be the assessment of that year, and used this language: "In view of the provisions of our statutes, as above mentioned, and numerous others, it is very manifest that the tax voted and sought to be enjoined in this case was regularly and legally to be levied upon the assessment of 1869, the year in which it was voted."

There is much doubt of a purpose in that case to hold that in all cases of voting such aid the levy must be made on the assessment of the calendar year in which it was voted. In fact there were some words used indicating that the holding is only applicable to that case. We are not without apprehension of danger in fixing upon any definite time as applicable to all such cases. However, a majority of this court are of the opinion that, in view of the time the tax was voted, with other facts in this case, the levy of the tax on the assessment of 1883 is not erroneous, and that the claim of the appellees in that respect can not avail to defeat the tax. Justice Rathrock and the writer of this opinion hold to the view that the assessment for 1884 is the one on which the levy should have been made, but think the plaintiffs are not entitled to relief on that account. There was an assessment for 1884, and we think before equity will restrain the collection of the tax because of the levy on the wrong assessment, the plaintiffs must show prejudice resulting from the error; as that, in consequence of the levy being on the wrong assessment, a greater tax is imposed. If the amount of the tax is less or equal, there can certainly be no just grounds for complaint. It is not like a case where there has been no assessment for the year of 1884, to enable the plaintiffs to know as to their prejudice, and allege the fact, if true.

III. The articles of incorporation of the Dubuque company state that the objects of incorporation are to construct, operate and maintain a railroad from Dubuque in a western and north-western direction in Iowa, Minnesota and Dakota, to a junction with the Northern Pacific. It is urged that the line, as now formed and extending from Dubuque to St. Paul, is such a departure from the original undertaking as to avoid the tax. The petition signed by the citizens of the township in which

the vote was ordered, and notice for the election, conform to the statutory requirements in stating the amount of work to be done on the road, and when and where it must be done, and to what point the road must be completed before the tax was collectible, and these provisions have been fully complied with. The record of the case satisfies us that at the time the tax was voted a general course was designed to be north and northwest, but the extent of the line and its northern terminus were matters which circumstances in the future must determine. It was well known that if the enterprise proves a success, it must have financial aid from other quarters than Dubuque, and it must have been understood that changes might be necessitated in securing the needful assistance. The record does not disclose that the tax was voted upon condition that the road was to be constructed into any other state or territory. It was known that the incorporators at the organization of the company had as objective points Minnesota and Dakota, and the Northern Pacific. The reaching of such points was not a condition of payment, and we are unable to say that the road may not yet be so constructed. We do not think in this respect there is such a deviation from the conditions under which the tax was voted as to excuse the payment.

This tax, as before stated, was voted on the twentieth of December, 1883, and the law under which it was voted was repealed April 9, 1884, and appellees say that fact avoids the tax. The case of *Burges v. Mabin*, 70 Iowa 643, is decisive of the law of this branch of the case. There is some question as to the amount of money and time expended after the vote, and before the repeal of the law, but we think it was unmistakably sufficient to support the contract, and avoid the operation of the repealing statute. It is sufficient to say that after the tax was voted, the company engaged as actively in the preparation for the work of construction as it could well do at that season of the year, and with the opening spring prosecuted its work with energy, and complied with the contract on its part. We think, also, that the expenditures made and the work done were in faith of the tax voted. With these views, we reach the conclusion, on rehearing of this case, that the petition is without merit, and that it should be dismissed. *Reversed.*

## SECTION TWO.

**Hays v. O., O. & F. R. V. R. R. Co., 61 Ill. 422.****Subscriber not released by portion of road being sold.**

The subscriber to the capital stock is not released by a portion of the road being sold to another company. Such sale, if unauthorized by legislation, is against public policy; the courts will not aid it, as it is in utter disregard of the duties and obligations of the company.<sup>1</sup> If the sale is unauthorized, it is simply an unlawful attempt to accomplish what can be done only by legislation, and is no defense against the subscription; and if it is authorized, the subscriber must be presumed to have contracted with reference to the possibility of its occurrence; so held also as to a change in the location.<sup>2</sup> If the lease is unauthorized the lessee is regarded simply as servant of the lessor, the latter being not released from its contracts or liabilities.

## SECTION THREE.

**Troy & Rutland R. R. Co. v. Kerr, 17 Barb. (N. Y.) 581.****Subscriber not released by sale of road.**

Action to recover stock subscription; sustained; opinion by Hand (doubting its correctness), Cady and James concurring. Allen taking no part.

Defendant insists that he was absolved from his obligation by the alteration of the articles of association, and by the sale and transfer of the road; but this, if unauthorized, did not, *ipso facto*, dissolve the corporation.<sup>3</sup>

It has been decided in England that one railroad corporation can not lease its road, or give up the management of its

<sup>1</sup> Great Northern, etc., v. Eastern C. R. Co., 9 Hare 806; Beman v. Rufford, 6 Eng. L. & Eq. 106; South Yorkshire R. Co. v. Great Northern R. Co., 19 Eng. L. & Eq. 518.      <sup>2</sup> Brinckerhoff v. Brown, 7 John. Ch. 217; Atty. Genl. v. Bank, Hopk. 754; Ward v. Sea Ins. Co., 7 Paige 294; Mickles v. Rochester City Bank, 11 Id. 118; Angell & Ames on Corp.,

<sup>3</sup> Illinois R. R. Co. v. Beers, 27 Ill. 185; Calvin v. Turnpike Co., 1 Carter 511.

line to another, nor delegate the powers conferred by statute, without the authority of the legislature. Those acts are *ultra vires*.<sup>1</sup> Not even with assent of all the stockholders.<sup>2</sup> Though this may be done with the consent of parliament.<sup>3</sup>

But such a contract would not discharge the liability of a subscriber to pay for his stock; if the pretended lease or sale is void it can not have that effect; and if not void, even though a breach of duty on the part of the directors, the stockholders have other remedies and can not withdraw.

HAND, J., reviewing numerous authorities pro and con, intimates an opinion that defendant is released because of the reduction of the original capital to a little more than one fifth of the original amount, and throwing up nearly a moiety of the road; but as his brethren think there was no such radical change of the plan and business of the corporation as exonerated the defendant, and that his subsequent promise is evidence of his acquiescence, he votes with them in favor of judgment for the plaintiff.

#### SECTION FOUR.

**Ottawa, etc., Co. v. Black, 79 Ill. 262.**

**Subscriber not released by lease of road in perpetuity.**

Suit to recover amount of subscription of defendants to the capital stock of the Ottawa, Oswego & Fox River Valley Railroad Company; judgment below for defendants; reversed.

Plea asserted that the corporation was to have been a competing line, and that on this supposition defendants subscribed, they having an interest in obtaining reduction of rates; thereafter plaintiff leased its road in perpetuity to another company, thus making such competition impossible, and plaintiff had also mortgaged the road and made the stock worthless.

<sup>1</sup> Beman v. Rufford, 1 Sim. N. S. 550; S. C., 6 Eng. L. & Eq. R. 106; 775.

Great, etc., Co. v. Eastern, etc., Co., <sup>2</sup> West London, etc., v. London, 11

9 Bore 313; Winch v. Birkenhead, C. B. 254; S. C., Id. 327; London, etc.,

etc., Co., 18 Eng. L. & Eq. R. 506; v. Southeasterly, 8 Exch. R. 584;

Shrewsbury, etc., v. Shrewsbury, etc., Ware v. Grand Junction, 2 R. &

1 Sim. N. S. 110; MacGregor v. Offi- Mylne 470.

cial Managers, etc., 16 Eng. L. & Eq.

R. 180.

The supreme court holds this plea insufficient, because if the plaintiff, at time of receiving the subscription, had the right reserved to execute leases, then defendants are held to have contracted with reference to the happening of such contingency and can not object to the lease; and if on the other hand such lease is unauthorized, then the liability and duty of the company to which the subscription was made, exist in full force in favor of the subscriber and the public.<sup>1</sup> The lessee in such case is regarded only as servant of the lessor; the latter having received its franchises from the state is not, by the act of leasing, discharged from any contract or liability. The subscriber, when he shall have paid up and received his certificate, may, by proceeding in equity, protect his interest and the corporate property against mismanagement, abuse, or illegal or unauthorized leases or contracts.

#### SECTION FIVE.

**Ready & Banks v. The Mayor, etc., 6 Ala. (N. S.) 327.**

**City becomes successor to town.**

A bond was made to the mayor and aldermen of the town of Tuscaloosa; subsequently the style of the corporation was changed to that of the mayor and aldermen of the *city* of Tuscaloosa; held, that an action under the latter name is properly brought, declaration alleging that the bond was made to the plaintiff under the former name and style.<sup>2</sup> The act reserves all rights and liabilities, and such would be the law without such provision.<sup>3</sup>

#### SECTION SIX.

**The Madison College v. Burke, 6 Ala. (N. S.) 494.**

**College may change its name and still recover on note.**

Assumpsit by the Madison College against Burke upon a note executed by him to the "Manual Labor Institute of South

<sup>1</sup> Hayes v. The Ottawa, Oswego & Fox River V. R. R. Co., 61 Ill. 422.

<sup>2</sup> Corporation of Colchester v. Seaber, 8 Burr. 1866.

<sup>3</sup> Such allegation was not contained in the declaration in Madison College v. Burke, 6 Ala. (N. S.) 494.

Alabama;" judgment for defendant. First count held bad because failing to show legal title in plaintiff; the plaintiff's name was changed to "Madison College" by act of legislature after the execution of the note; the act provides that such change shall not affect the corporation's right to recover its debts, or release it from its engagements; and such would have been the law anyway.<sup>1</sup> The count would have been good had it alleged these facts.

The money count was good, and under it the trial court erred in rejecting evidence showing the change in name, and that the defendant executed the note to the plaintiff under its former name; under such proof it would be entitled to recover. Reversed.

#### SECTION SEVEN.

**Wilmington & R. R. Co. v. Downward, — Del. —; 14 Atlantic 720.**

**Corporation may collect a judgment due to itself, although its own property has been sold on foreclosure.**

Mortgage by the Wilmington & Reading Railroad Company of its road and its Pennsylvania franchises (excluding, however, its Delaware franchise). Thereafter, upon foreclosure sale, all said property was sold to some parties who then obtained an act of the legislature of Delaware, incorporating them as a new company.

A corporation whose charter has expired is dead, but one which simply fails to elect officers is only dormant; debts due to the former are extinguished, but not so as to debts due the latter. The charter of the Wilmington & Reading R. R. Co. had not expired and was not revoked by the foreclosure sale of said road. Hence, it can be seen that the corporate existence of the Wilmington & Reading R. R. Co. had never been extinguished and that a judgment obtained in its favor before the formation of the new company was still its own property, not having been included in the mortgage; therefore, an assignment of it by the new company conveyed no title.

<sup>1</sup>Corporation of Colchester v. Seaber, 8 Burr. 1865.

## SECTION EIGHT.

**Kip et al. v. New York & H. R. R. Co., 67 N. Y. 227.**

**Lessor does not lose right to continue proceedings in condemnation.**

Proceedings in condemnation are not abrogated by the petitioner therein leasing its road to another company. The lease does not affect the petitioner as a corporation in its relation to the state. The same necessity existed for the condemnation for the purposes of the petitioner after as before the lease was made. But even if the necessity now exists only in favor of the lessee, it is a necessity for taking this land to operate lessor's road for public use, and it is competent for the lessee to continue the proceedings in lessor's name. The act of 1869 expressly authorizes proceedings by either the original company or its lessee.

## SECTION NINE.

**Norwich & W. R. Co. v. City of Worcester, 147 Mass. 518; 18 N. E. 409.**

**Lessor has the right to compensation for damages caused by city changing grade.**

A railroad company leased its road to another for a term of one hundred years; thereafter the lessor condemned land for a new depot building, and before such building was erected the city so changed the grade of this land as to materially injure it. To a suit for damages, by the lessor against the city, it was pleaded that the lessor was not entitled to claim the same; that if any damages were incurred, the suit therefor should be by the lessee. The court construes the lease and finds that the land, when condemned, did not, *ipso facto*, come under the lease; the terms of the lease implied that the lessor would obtain the land and would erect the building and lay the tracks thereon, and then turn the same over to the lessee. The lease embraced the road, "together with all the lands on which said railway is or shall be located;" also all tracks, depot grounds, buildings, etc., "now used and belonging, and to be used or belonging, or in anywise appertaining to said road." Provision is made for the purchase of new depot grounds, and



for the costs of the new line, grounds and buildings, and that "the new track, grounds and buildings shall be included under this indenture of lease, for the same time and upon the same terms and conditions that the railway is herein leased." The lease was of a completed road; the lessee was to keep it in repair; the lessee was to be the actor in everything, except when it came to establishing the new station; evidently, here, the lessor was to be the actor and the property was to remain in the lessor's possession until completed, and then be turned over to the lessee. Land purchased by the lessor, which was not connected with the road, but was intended for future use after it should be fitted and prepared, would not be land on which the road was located, and would be no part of the road; though procured for the purpose of changing the road, it would not be a part of it until the change would be made and the new tracks put in connection with the road.

#### SECTION TEN.

**State v. St. Paul & Sioux City R. Co., 85 Minn. 222.**

##### **Franchises not forfeited by sale of road.**

Quo warranto by the state upon relation of the attorney-general against the St. Paul & Sioux City Railroad Company to adjudge its charter, liberties, privileges and franchises forfeited, and its existence as a corporation annulled.

Its failure to build a certain portion of the road is held to involve only the loss of such portions; that is the penalty attached by the terms of the legislation; it is clear that the legislature did not intend that such failure should cause a forfeiture of the charter.

The legislature authorized the respondent to sell all its roads, but the act provided that all the respondent's charter rights and operating and other franchises should remain unaffected by such sale; hence, the sale made by it and its consequent cessation of operations as a railroad, can not be deemed to work a forfeiture of its charter as a corporation; the sale was authorized by the legislative act. The respondent, though primarily a railroad company, yet had other franchises and

powers, not a part of or connected with, but independent of, those necessary to enable it legally to construct, maintain and operate railroads. It was given power to take, hold and dispose of its granted lands.

The consent of the state may not prevent forfeiture of the corporate franchise, where the corporation disposes of and abandons all its business and operating franchises, so that there is nothing left which it can lawfully do, and so that there can be no reason for keeping it longer in life. But here, though it alienates its principal business, yet it retains the lands and the franchises connected therewith and the powers thereover, and has done all this with the legislative authority; hence there is no cause for forfeiture; the act not only says that these franchises shall remain unaffected but says also that the lands shall not be more nor less taxable than before, thus referring to a future holding of the land. Judgment for respondent.

#### SECTION ELEVEN.

**Day v. Ogdensburg & L. C. R. Co., 107 N. Y. 129; 13 N. E. 765.**

**Corporation is not, ipso facto, dissolved by failing to comply with charter condition.**

Action by the holders of coupons for interest on the income bonds issued by the Ogdensburg & Lake Champlain Railroad Company, organized under the laws of New York, to restrain that company from using its income to pay bonds issued by, and operating expenses of, the Lamoille Valley Extension Railroad Company, organized under the laws of Vermont; the latter company held its charter on condition that if it did not commence the construction of its railroad in ten years, "then said corporation shall be dissolved." It did not commence in ten years, and after their expiration made a contract with the Ogdensburg company whereby the Lamoille company was to issue bonds sufficient to build the road and when completed, the Ogdensburg company was to take a lease of it in perpetuity; subsequently the road was built and the lease made.

It was contended that the Lamoille company had no power to do any corporate act, being dissolved by expiration of said ten years. The words are "said corporation shall be dis-

solved." But in this state it is well settled that dissolution is not affected by a mere failure to perform the condition, nor without judicial proceeding and judgment. The case is distinguishable from those in which the statute says the road's "corporate existence and power shall cease."<sup>1</sup> They hold that such a statute executes itself, and the corporation is extinguished by virtue of an express limitation upon the original grant of the corporate power, but that in the absence of such language there is not, *ipso facto*, a loss of corporate power. And in Vermont it is held that unless the legislature undertakes to declare a forfeiture for facts that have already occurred, it appertains to the judicial department to ascertain whether such forfeiture has been incurred.<sup>2</sup> It is also objected that the Ogdensburg road had no power to enter into the lease, but such power is found in the statute "authorizing railroad companies to contract with each other,"<sup>3</sup> under which it may agree with any other railroad company for the use of its road, "not inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract."

The Lamoille company had power to contract, as already stated, and among those expressly given by its charter is the power to lease. The Ogdensburg company, therefore, had power to accept the lease, unless its own power was limited to dealing with roads within its own state; but there is no statute nor principle which so requires. A corporation given capacity to contract may exercise such power within or without the state unless the law-making power of that other state forbids.<sup>4</sup> The New York statutes and interpretations thereof are to the same effect.<sup>5</sup> The lease in question was valid; both parties thereto had power to enter into it. The terms of the lease and mortgage and bonds are then construed and the rights of the parties as to the application of the income are determined.

<sup>1</sup> Re Railroad Co., 72 N. Y. 245; 75 N. Y. 835; Brooklyn S. T. Co. v. Brooklyn, 78 N. Y. 525.

<sup>2</sup> Railroad v. Railroad, 84 Vt. 2.

<sup>3</sup> Laws, 1839, Ch. 218.

<sup>4</sup> Bank of Augusta v. Earle, 13 Pet.

<sup>5</sup> Woodruff v. Railway Co., 93 N. Y. 609; Re Railway Co., 99 N. Y. 12; 1 N. E. R. 27; Re Townsend, 89 N. J. 171; Re Rapid Transit Co., 103 N. Y. 251; 8 N. E. R. 548.

## SECTION TWELVE.

**Irvin v. Nashville, C. & St. L. Ry. Co., 92 Ill. 103.**

**Arrangements for through shipping construed not to make consolidation, although joint name is used; the several names being also used, each company remains entitled to its own property.**

Several railroad companies arranged for the through carriage of freight; the combination was called "Green Line"; the cars and vessels bore that name, as also the names, respectively, of the roads to which belonging. There was no joint property, no joint expense, no joint fund, no joint losses, no joint profits; no arrangement to share loss or profit; each road was operated by its owner, hired and paid its own agents, paid any loss occurring on its road. The only exception was that if a loss could not be located they all paid *pro rata*. This did not create a partnership or joint liability as between the roads themselves or as to third persons. There was no community of interest, no community of profits and losses, but all was several; there can be no partnership without a "communion of profit."<sup>1</sup>

The shipper's grain was delivered to one Osborn, who was the agent of the Nashville & Northwestern Railroad Company. The Nashville & Chattanooga Railroad Company was not at all at that time in business at the place where the grain was received. It thereafter bought<sup>2</sup> the Nashville & Northwestern Railroad, and caused its own name to be changed to Nashville, Chattanooga & St. Louis Railway Company. There is nothing showing any consolidation of these two roads under the new name, nor any assumption of the debts or liabilities of the former company. The grain was lost on a barge towed by a steamboat connecting with the Nashville & Northwestern Railroad and not in the employ of the Nashville & Chattanooga Railroad Company.

The owner of the grain brings attachment and seizes a wharf boat belonging to the Nashville, Chattanooga & St. Louis Railway Co.; replevin thereof by the latter is sustained.

Such arrangements have been held to be partnerships where

<sup>1</sup> Story on Partnership, § 18.

not mentioned in the statement of

<sup>2</sup> Manner and terms of purchase are the case nor in the opinion.

the earnings were put into a common fund and divided according to the lengths of the respective lines,<sup>1</sup> but it is said in the same case that it would be different if each stage owner was to receive and retain the passage money earned on his line, and sustain all the expenses thereof, and act only as agent of the others in receiving the passage money for them for transporting the passengers over their lines.

It is not a partnership, nor does it create a joint liability, for each road to charge only a stipulated rate of freight, thus informing the shipper in advance of the total, and then for each road on receipt of the freight, to pay the prior road the amount already due for its earnings, the next road to reimburse the prior road for its outlay and to pay its earnings to it, and the last road to collect the total from the consignee.<sup>2</sup> Nor is the company which sells a through ticket liable for injury upon the line of the connecting road, though there be an agreement as to the division of through ticket money and an arrangement for through cars; no community of interest, of obligation or of responsibility results from such agreement.<sup>3</sup> On the contrary, however, it has been held that the company which sells a through ticket over its own and other roads is liable for the safe carriage of passengers and baggage to the place of destination.<sup>4</sup> The connection in business between the several roads in the principal case goes hardly beyond the extent of securing a continuous passage of freight without breaking bulk; this is not sufficient to create partnership or joint liability.<sup>5</sup>

The plaintiff in replevin is not estopped by having the words "Green Line" painted on the wharf boat; it had also its own name thereon, which would neutralize the former; or at all events put shippers upon inquiry; there is nothing in the case as to any actual representations as to ownership or joint liability upon which to base defendant's claim.

<sup>1</sup> *Champion v. Bostwick*, 18 Wend. 175.

<sup>2</sup> *Darling v. Boston & Worcester R. R. Co.*, 11 Allen 295.

<sup>3</sup> *Hartan v. Eastern Railroad Co.*, 114 Mass. 44.

<sup>4</sup> *Illinois Central R. R. Co. v. Copeland*, 24 Ill. 332.

<sup>5</sup> *Merrick v. Gordon*, 20 N. Y. 93.

## SECTION THIRTEEN.

**State ex rel. v. Minnesota Central Ry. Co.; Same v. Hastings & D. Ry. Co., 36 Minn. 246; 30 N. W. 816.**

**Road sold to new company; charters of original companies forfeited for non-user.**

Two railroad companies having received land grants upon their construction, afterward sold to another company their lines which they had built under their charters, and for four years neither owned nor operated any line, yet they claimed still to be corporations exercising certain other franchises, to wit, the right to hold and dispose of lands granted upon the construction of the roads, or designated portions thereof, exempt from all taxation. Quo warranto proceedings were brought against them, resulting in a judgment of forfeiture and for dissolution of both of the corporations upon the following grounds: A corporation may lose its franchises upon a mis-user or non-user and the state may resume the same under a judgment in quo warranto to ascertain and enforce the forfeiture.<sup>1</sup> The statute provides that when any railroad company suspends its lawful business for one year it shall be deemed to have forfeited the rights, privileges and franchises granted by any act of incorporation, and shall be adjudged to be dissolved.<sup>2</sup> Such forfeiture may be enforced by quo warranto proceeding.<sup>3</sup> But the general rule is that a corporation is not to be deemed dissolved until a forfeiture is judicially ascertained and adjudged.<sup>4</sup> The cause of forfeiture can only be taken advantage of by the state in a direct proceeding for the purpose.<sup>5</sup> In case of negligence or non-user, it has been left to the court to decide whether the act or omissions had been such under all the circumstances as to warrant a judgment.<sup>6</sup> But the statute leaves no discretion to the court and makes forfeiture obligatory if business is suspended for one year; the terms of the

<sup>1</sup>Terrett v. Taylor, 9 Cranch 51; 256; Bradt v. Benedict, 17 N. Y. 99; People v. Hudson, 6 Cow. 217. Minnesota Central R. Co. v. Melvin,

<sup>2</sup>Gen. St. 1878, c. 76, § 11; Rev. St. 21 Minn. 344.  
1866, c. 76, § 11; Id., c. 79, § 2; Comp. S. 1858, c. 67, § 8.

<sup>5</sup>Heard v. Talbot, 7 Gray 120.

<sup>3</sup>State v. St. Paul & S. C. Ry. Co., 605; Hart v. Railroad Co., 40 Conn. 28 N. W. R. 245. 524.

<sup>6</sup>Harris v. Railroad Co., 51 Miss.

<sup>4</sup>People v. Turnpike Co., 23 Wend.

statute admit of no excuse or explanation.<sup>1</sup> The non-user complained of, must undoubtedly relate to matters which are of the essence of the contract between the corporation and the state.<sup>2</sup> These corporations were created by the state to maintain, have, use and operate railroads, and on this consideration and condition were given special franchises and privileges and endowed with land grants.<sup>3</sup> Hence, their suspension of business brings them under the statute, notwithstanding their reservation of their land grants and franchises upon the sale or transfer by them of the railroads.

The right to acquire and sell, and in the meantime to hold exempt from taxes these lands, is a franchise, but ancillary and subordinate to the main purpose for which chartered. The failure to discharge their duties to the public and the non-user or suspension of their principal business as railroad companies, is a sufficient ground for an absolute forfeiture of their corporate rights.<sup>4</sup> By consent of the state such subordinate franchises may exist and continue to be exercised independently of the franchise to construct and operate railroads,<sup>5</sup> but this can be only by legislative act; the state can not in such case be bound by the acts of its executive officers.<sup>6</sup> Respondents insist that the state, by special acts and the course of legislation, has consented to the continued existence of the corporations and to their retaining their franchises to hold the lands after they had sold their railroads, or, in other words, that the state had waived the forfeiture resulting from their suspension of their lawful business as railroads. The court then reviews a number of acts,<sup>7</sup> and arrives at the conclusion that they do

<sup>1</sup> *People v. Railroad Co.*, 53 Barb. 123; *State v. Building Ass'n*, 35 Ohio St. 264; *Bradt v. Benedict*, 17 N. Y. 96.

<sup>2</sup> *Com. v. Bank*, 28 Pa. St. 389; *Att'y Gen'l v. Railroad Co.*, 6 Ired. 469; *Mor. Corp.*, § 1025.

<sup>3</sup> *Mor. Corp.*, 2d Ed., §§ 1114, 1115.

<sup>4</sup> *Ward v. Sea Ins. Co.*, 7 Paige 296; *In re Jackson Ins. Co.*, 4 Sandf. Ch. 562; *Mickles v. Bank*, 11 Paige 126; *Atty. Genl. v. Railroad Co.*, 6 Ired. 469; *Heard v. Talbot*, 7 Gray 120.

<sup>5</sup> *State v. St. Paul & S. C. Ry. Co.*, 28 N. W. R. 247.

<sup>6</sup> *People v. Phoenix*, 24 Wend. 431;

*People v. Plank Road Co.*, 27 Barb. 458; *Ang. & A. Corp.*, Sec. 777; *People v. Kingston Turnpike Co.*, 23 Wend. 212.

<sup>7</sup> Act of May 23, 1857, concerning Minneapolis & Cedar Valley R. R. Co.; special laws of 1864, c. 2; *Minnesota C. R. Co. v. Melvin*, 21 Minn. 340; act of Feb. 24, 1886, concerning McGregor & Western R. R. Co.; also act of March 7, 1867; Gen. St. 1866, c. 34, § 39; act of Feb. 29, 1868, concerning Minnesota C. R. Co.; Sp. Laws 1866, c. 12, § 15; Sp. Laws 1867, c. 11, § 19; act of Feb. 28, 1876; Sp.



not show any such waiver. The fact that the company which bought the railroads from the respondents has continued to operate them and has paid the taxes required by the charters does not affect the question of the suspension of corporate duties by the respondents.<sup>1</sup> A company which leased its works for two and a half years, thereby suspended its lawful business and committed an act of self-destruction.<sup>2</sup>

BERRY J., dissents, holding that the state did acquiesce in or consent to the respondents selling their railroads and still maintaining their corporate existence for the purposes of the franchises in question.<sup>3</sup>

#### SECTION FOURTEEN.

**Pennsylvania, etc., Co. v. St. Louis, etc. Co.,** 118 U. S. 290; 6 S. C. R. 1094.

**Lessor's remedy may be in equity.**

Bill by the St. Louis & Terre Haute Railroad Company against the Indianapolis & Terre Haute Railroad Company to recover accrued rent and to enforce specific performance of a ninety-nine year lease, and to hold responsible thereon certain other companies as guarantors. It is urged that the remedy should be at law and not in equity, but it is held that the relief at law would be very inadequate; to sue for every installment of rent, and have a monthly resort to a lawsuit against the guarantor, the lessee being insolvent, is destructive of the substantial rights of the lessor, and almost a denial of justice. The lessor is entitled, if the lease is valid,<sup>4</sup> to have those clauses specifically enforced which require the lessee to

Laws 1876, c. 115, § 3; Sp. Laws, 1877, c. 218, § 4; Sp. Laws 1878, c. 234, § 4; Gen. St. 1866, c. 34, § 39 (Gen. St. 1878, c. 34, § 69); Sp. Laws 1872, c. 93; Sp. Laws 1881, c. 221.

<sup>1</sup> Lake Ontario R. R. v. Curtiss, 80 N. Y. 224; People v. Northern R. R., 53 Barb. 123; Com. v. Turnpike Co., 5 Cush. 509.

<sup>2</sup> Conro v. Port Henry Iron Co., 12 Barb. 63; People v. Hudson Bank, 6 Com. 219, 220; State v. Commercial

Bank, 13 Smedes & M. 569; State v. Rives, 5 Ired. 309; Mor. Corp. 1115; State v. Railroad Co., 29 Conn. 547.

<sup>3</sup> Corporations may, even after consolidation, keep up their existence for some purposes, *e. g.*, to determine their officials, their share of property and of earnings as basis for paying interest or dividends. Hart v. Ogdensburgh, 28 N. Y. Supp. 639.

<sup>4</sup> It is, however, held invalid; see this point given on another page.

keep the road in first class condition. It is no remedy to require the lessor to wait till it is depreciated and then to bring vexatious, unsatisfactory, expensive and repeated suits for damage. So, also, the clause requiring lessee to keep accounts for lessor's protection and in lessor's interest, as the basis of the rent charges, is one which requires the examination of a master and not of a jury.

#### SECTION FIFTEEN.

##### Sundry instances.

A note made to the Sonoma Academy may be sued upon by Cumberland College, the complaint averring that these institutions are the same. *Cumberland College v. Ish*, 22 Cal. 641.

A corporation is a necessary party to a suit by a party seeking to enjoin another party from acting under the powers of such corporation. *People v. Degrauw*, 133 N. Y. 254, 30 N. E. 1006, reversing 16 N. Y. Supp. 697.

A corporation which has ceased to exist, is said, nevertheless, to be a proper party to a suit attacking property in the hands of one claiming under it; it is a proper party in order to determine judicially that it is really "*dead*." *People v. N. Y., etc., Co.*, 21 N. Y. Supp. 373.

## CHAPTER XVI.

## RIGHTS OF THE SUCCEEDING CORPORATION.

The consolidation acquires the rights of the constituent to collect taxes or bonds voted in aid, when such consolidation does not effect a substantial diversion from the purposes and projects contemplated by the people who voted the aid, but on the contrary offers the efficient, perhaps only, means whereby such purposes and projects could be carried through.

So, also, where consolidation is authorized by the existing laws, all persons are presumed to have acted subject to this contingency occurring, and they must expect that a consolidation might take place.

The rights of the succeeding corporation are in the main settled by statute; the precedents, therefore, offer chiefly but construction of particular statutory phrases.

The rights to carry on condemnation proceedings, to use streets, to take lands under specific grants possessed by the constituent corporations, have all been held to pass to the consolidated corporations, either because of the latter being the same in identity with the former, or entitled by way of assignment under the text of the statutes to the rights of the former, or yet because of being the representative of the public in carrying out an improvement of a *quasi* public nature.

Franchises, however, do not pass from the preceding to the succeeding corporation, not even by instruments undertaking to transfer them, unless the original possessor has been specially authorized to dispose of them, or such power may be fairly inferred; a corporation, unless restricted, has general power to dispose of its property, but, unless authorized, has no power to dispose of its franchise; statutes creating corporations are, however, construed as conferring no powers excepting those mentioned, and hence, a certain corporation having received power to sell certain properties, is held not to have received the power to sell its subscriptions.

The consolidation can not enforce rights derived from the

original corporations unless complying with the statutory prerequisites to a consummated consolidation, nor even with legislative authority can it enforce subscriptions made to its predecessor unless tendering to the subscribers the specific bonds of such predecessor promised them.

### SECTION ONE.

**Livingston County v. First National Bank**, 128 U. S. 102; 9 S. C. R. 18.

**The consolidation becomes entitled to a tax voted to its constituent.<sup>1</sup>**

A tax was voted in aid of a railroad corporation, which thereafter was consolidated with another; the new result taking the name of the latter, it is held that the consolidation is entitled to the tax.

Following is opinion in full:

The grounds urged for reversing the judgment are: (1), that the statutes of Missouri did not authorize the consolidation of a railroad company organized under the laws of Missouri, with a railroad company organized under the laws of another state; (2), that an authority to subscribe to stock in, and issue bonds to, the Chillicothe & Omaha Railroad Company was not an authority to subscribe to stock in, and issue bonds to, the St. Louis, Council Bluffs & Omaha Railroad Company; and (3), that it does not appear by the face of the bonds, or by the findings of the court, that the county court ordered any subscription for stock in either the Chillicothe & Omaha Railroad Company, or the St. Louis, Council Bluffs & Omaha Railroad Company to be made, or that any subscription for stock of either of those companies was in fact made, or that any stock of either company was ever issued to the county or to the township.

(1.) As to the authority for the consolidation. It was enacted as follows by the act of the legislature of Missouri, approved March 2, 1869, entitled "An act to authorize the consolidation of railroad companies in this state with companies owning connecting railroads in adjoining states" (Laws

<sup>1</sup>This very recent opinion presents *County*, 92 U. S. 569, and *County of substantially a complete review of Bates v. Winters*, 97 U. S. 83, that the supreme court's prior decisions the decisions therein "would not be, on this very important topic; the if applicable here, a sound doctrine." court says of *Harshman v. Bates*

of 1869, p. 75, and 1 Wagner's Missouri Stats. of 1870, p. 314, § 56):

"Section 1. That any railroad company organized under the general or special laws of this state, whose tracks shall at the line of the state connect with the track of the railroad of any company organized under the general or special laws of any adjoining state, is hereby authorized to make and enter into any agreement with such connecting company for the consolidation of the stock of the respective companies whose tracks shall be so connected, making one company of the two, whose stocks shall be so consolidated, upon such terms and conditions and stipulations, as may be mutually agreed upon between them, in accordance with the laws of the adjoining state in which the road is located, with which connection is thus formed."

The statute then went on to enact details in regard to the consolidation. The fourth section of the act provided as follows:

"Section 4. Any such consolidated company shall be subject to all the liabilities, and bound by all the obligations of the company within this state, which may be thus consolidated with one in the adjacent state, as fully as if such consolidation had not taken place, and shall be subject to the same duties and obligations to the state, and be entitled to the same franchises and privileges under the laws of this state, as if the consolidation had not taken place."

This statute applied to the consolidation in question, although no road had yet been constructed.

It is not contended that the provisions of this statute were not complied with in making the consolidation in question. The consolidated company was, by the statute, to be entitled to the same privileges under the laws of the State of Missouri, as if the consolidation had not taken place. This can only mean that it was to be entitled to the same privileges under the laws of Missouri, that the Missouri corporation was entitled to under the laws of that state at the time the consolidation took place. One of those privileges was the privilege of a subscription to stock by the township of Chillicothe.

(2.) As to the authority to subscribe to stock in, and issue bonds to, the St. Louis, Council Bluffs & Omaha Railroad Company, under the vote of the people of the township to sub-

scribe to stock in, and issue bonds to, the Chillicothe & Omaha Railroad Company. The case of *Harshman v. Bates County*, 92 U. S. 569, decided by this court at October term, 1875, is relied upon by the plaintiff in error as a decision against the validity of the bonds in that respect. It arose under the same statute of Missouri, of March 23, 1868. The bonds were issued by the county of Bates, in behalf of Mount Pleasant township, in that county, to the Lexington, Lake & Gulf Railroad Company, in January, 1871. The taxpayers of the township had, in May, 1870, at an election, voted in favor of a subscription to the stock of, and the issue of bonds to, the Lexington, Chillicothe & Gulf Railroad Company. In October, 1870, the corporation was consolidated with another corporation, under the name of the Lexington, Lake & Gulf Railroad Company. Thereafter, in January, 1871, the county court, in pursuance only of the authority conferred by such vote, subscribed the specified amount, in behalf of the township, to the consolidated company, and issued the bonds to it in payment of the subscription. The objection was taken, that the question of subscribing to stock in, and issuing bonds to, the consolidated company was never submitted to a vote of the people of the township. This court held, that as, at the time of the consolidation, no subscription to stock had been made, and thus no vested right had accrued to the company named in the vote, the extinction of that company worked a revocation in law of the authority to subscribe to stocks and to issue bonds. In that case, it appeared, by the face of the bonds, that the vote of the people was to subscribe to the stock of the Lexington, Chillicothe & Gulf Railroad Company, and that that company and another had been consolidated under the name of the Lexington, Lake & Gulf Railroad Company. This court held, that this recital in the bonds was sufficient to put the holder on inquiry, and that the bonds were invalid. The suit was brought by a holder of coupons attached to the bonds, against the county, to recover the amount of the coupons.

In *County of Scotland v. Thomas*, 94 U. S. 682, at October term, 1876, the suit was brought on coupons attached to bonds issued by the county of Scotland in the State of Missouri, on on its own behalf, to the Missouri, Iowa & Nebraska Railroad Company, for a subscription on behalf of the county to the stock of that corporation, which was a corporation formed

by the consolidation, in March, 1870 (under the above mentioned act March 2, 1859), of the Alexandria & Nebraska City Railroad Company of Missouri (formerly the Alexandria & Bloomfield Railroad Company), with the Iowa Southern Railroad Company of Iowa. It was claimed that the power to subscribe to the stock had been given by the charter granted in 1857 by Missouri to the Alexandria & Bloomfield Railroad Company, before the adoption of the state constitution of 1865, which required that the question of subscribing to stock should be submitted to a vote of the qualified voters of the county. No vote had been taken in the case. It was contended, on behalf of the plaintiff, that the consolidated corporation acquired by the consolidation all the privileges of the Alexandria & Nebraska City Railroad Company, and among others, the privilege of receiving county subscriptions to its capital stock. This court held, that the prohibition of the constitution of 1865 only extended to restraining the legislature from authorizing in the future municipal subscriptions or aid to private corporations without a vote of the people of the municipality, but did not take away any authority previously granted to subscribe to stock without a vote of the people. It also held that the simple consolidation with another company did not extinguish the power of the county to subscribe or the privilege of the company to receive a subscription; as authority for this view it cited the case of *The State v. Greene County*, 54 Missouri 540.

In the case of *County of Scotland v. Thomas*, the power to consolidate was given in 1869, after the original charter of 1857 was granted, and after the constitution of 1865 went into effect; but it was held that that fact did not affect the power. In its opinion, the court said (p. 691), that the railroad authorized by the charter of 1857, "was a 'railroad from the city of Alexandria, in the county of Clark, in the direction of Bloomfield, in the State of Iowa, to such point on the northern boundary line of the State of Missouri as shall be agreed upon by said company; and a company, authorized on the part of the State of Iowa, to construct a railroad to intersect the road authorized to be constructed by the provisions of this act, at the most practicable point on said state line.' Bloomfield was a small town in Iowa, evidently not intended as the final objective point of the proposed line, which is only required to



be 'in the direction of Bloomfield.' A connection with a continuous road in Iowa was the declared object of the road proposed. It was evidently the purpose to bring Alexandria, a port of Missouri on the Mississippi River, in connection with the rich region of southern and western Iowa, by means of the road then being chartered, and a road to connect therewith, running into the State of Iowa. This purpose will be most effectually attained by the construction of the continuous line contemplated by the consolidated companies. The general direction of the road is not changed. It does not pass through Bloomfield, it is true; but it does not pass it by so far as to be a substantial departure from the route originally indicated. The amending act, therefore, which authorized a consolidation with the Iowa Southern Railway Company, and thereby constituted the Missouri, Iowa & Nebraska Railway Company, was in perfect accord with the general purpose of the original charter of the Alexandria & Bloomfield Railroad Company; and, if the other rights and privileges of the latter company passed over to the consolidated company, we do not see why the privilege in question should not do so, nor why the power given to the county to subscribe to the stock should not continue in force."

The court distinguished the case from that of *Harshman v. Bates County*, 92 U. S. 569, on the ground that in that case the subscription to the stock was made by the county court in behalf of a township, and that the county court was regarded as being the mere agent of the township, and as having no discretion to go beyond the precise terms of the powers given to it, to subscribe to the stock of the company named in the vote; while in the case of Scotland county, the county court acted as the representative authority of the county itself, and was officially invested with all the discretion necessary to be exercised under the change of circumstances brought about by the consolidation.

The court further proceeded to say, in the Scotland county case (p. 693): "If we look at the subject in a broad and general view, it will be still more manifest that the power in question was intended to exist, notwithstanding the consolidation. The project of the railroad promised a great public improvement, conducive to the interests of Alexandria and the country through which it would pass. Its construction, how-

ever, would greatly depend upon the local aid and encouragement it might receive. The interests of its projectors and of the country it was to traverse was regarded as mutual. The power of the adjacent counties and towns to subscribe to its stock, as a means of securing its construction, was desired not only by the company, but by the inhabitants. Whether the policy was a wise one or not is not now the question. It was in accordance with the public sentiment of that period. The power was sought at the hands of the legislature, and was given. It was relied on by those who subscribed their private funds to the enterprise. It was involved in the general scheme as an integral part of it, and as much contributory and necessary to its success as the prospective right to take tolls. Why it should not still attach to this portion of the road, as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or otherwise, it is difficult to see."

The conclusion of the court was, that the power of the county of Scotland to subscribe, being a right and privilege of the Alexandria & Nebraska City Railroad Company, passed, with its other rights and privileges, into the new conditions of existence which that company assumed under the consolidation of this, although the company with which the consolidation was effected belonged to the State of Iowa.

In *Town of East Lincoln v. Davenport*, 94 U. S. 801, at October term, 1876, which was a suit on coupons attached to bonds issued by a town in Illinois, provision had been made by statute, prior to the time when a subscription was made by that town to the stock of a railroad company, that the company might consolidate with other companies in order to carry out the object of its charter, and that its franchises, rights, subscriptions and credits might be transferred; and such consolidation was effected, and a subsequent transfer by the consolidated company was lawfully made to a new company engaged in constructing a connecting road, thus forming a continuous line, the stockholders in the former companies becoming stockholders in the new company. It was held that a delivery by the town to such new company of bonds for the payment of the original subscription, and a receipt of a certificate of stock in the new company, were warranted by law. In the opinion of the court the doctrine of the case of *County of*

Scotland v. Thomas, 94 U. S. 682, was confirmed, and the distinction drawn in that case between it and the case of Harshman v. Bates County, 92 U. S. 569, was adverted to.

In County of Bates v. Winters, 97 U. S. 83, at October term, 1877, the suit was brought to recover the amount of bonds and coupons issued by the county of Bates, in the State of Missouri, in behalf of Mount Pleasant township, in that county. The bonds were issued in January, 1871, to the Lexington, Lake & Gulf Railroad Company, a corporation formed by the consolidation of the Lexington, Chillicothe & Gulf Railroad Company with another corporation. The township had voted in April, 1870, in favor of a subscription to the stock of, and the issue of bonds to the Lexington, Chillicothe & Gulf Railroad Company. No subscription to the stock of that company was shown to have been made, but the subscription was made on the books of the new company formed by the consolidation. This court held, that as, in fact, no subscription had been made to the stock of the Lexington, Chillicothe & Gulf Railroad Company, the bonds were void, under the ruling in Harshman v. Bates County, because the popular vote gave authority to subscribe to the stock of one company, while the subscription was made, and the bonds were issued to a different company; and that the recitals in the bonds were such that there could be no *bona fide* holders of them. The bonds recited, on their face, that the vote had been on the propositions to subscribe to the capital stock of the Lexington, Chillicothe & Gulf Railroad Company, and that that company and another company had been consolidated into one company, under the name of the Lexington, Lake & Gulf Railroad Company, to which latter company the bonds were, on their face, issued. This court reversed the judgment below, which had been in favor of the plaintiff, and remanded the case for a new trial.

In Wilson v. Salamanca, 99 U. S. 499, at October term, 1878, the suit was against the township of Salamanca, in Cherokee county, Kansas, to recover the amount of coupons detached from bonds issued by that township to the Memphis, Carthage & Northwestern Railway Company. The bonds were issued in September, 1872, in pursuance of an election held in November, 1871, at which it was voted to subscribe to stock in, and issue bonds to, the State Line, Oswego & Southern

Kansas Railway Company. After the vote was had, the latter company was consolidated with another railroad company, into a new corporation, to which the bonds were issued. The subscription was made to the stock of the new corporation, and no other vote was had than the one above mentioned. The case came up on questions certified, one of which was as follows: "Whether or not it is a defense to this action by a *bona fide* holder for value of the interest coupons sued on, without actual notice, that after the order of the board of county commissioners of an election, and after a favorable vote by a three-fifths majority of the qualified electors of Salamanca township, according to the law, to subscribe stock in the State Line, Oswego & Southern Kansas Railroad Company, payable in negotiable bonds, to aid in the construction of its railroad, the subscription of stock and the issue of bonds, without any further election were made to the Memphis, Carthage & Northwestern Railroad Company, with which said prior company, in whose favor the vote was had, had become merged and consolidated under a law existing at the time of the said election, to form a continuous line."

The judgment of the circuit court was in favor of the township; but this court reversed the judgment, and answered the above questions in the negative, on the authority of the case of *County of Scotland v. Thomas*, 94 U. S. 682.

The court said: "The power of the State Line, Oswego & Southern Kansas Railroad Company to consolidate with other companies, existed when the vote for subscription was taken in the township. When the consolidation took place, there was a perfected power in the township to subscribe to the stock of that company, and there was also an existing privilege in the company to receive the subscription. That privilege, as we held in the *Scotland county case*, passed by the consolidation to the consolidated company." The court distinguished the case from that of *Harshman v. Bates County*, 92 U. S. 569, on the ground that the township trustee and the township clerk, who made the subscription and issued the bonds in the *Salamanca township case*, acted in their official capacity as the constituted authorities of the township, and its legal representatives, and not as mere agents, and occupied the position of the county court in the *Scotland county case*.

In *Menasha v. Hazard*, 102 U. S. 81, at October term, 1880,

the suit was against the town of Menasha, in the county of Winnebago and State of Wisconsin, to recover the amount of coupons detached from bonds issued by that town to the Wisconsin Central Railroad Company, in October, 1871. It had been voted by the town in June, 1870, to issue bonds to the Portage, Winnebago & Superior Railroad Company. After the vote was had, and in November, 1870, the Portage, Winnebago & Superior Railroad Company was consolidated with another company, and its name was changed in February, 1871, to that of the Wisconsin Central Railroad Company, and a further consolidation took place with a company to which the bonds were afterward issued. It appeared that, before the subscription and the bonds were voted, the Portage, Winnebago & Superior Railroad Company was authorized by statute to consolidate with other companies constructing connecting lines, and that the consolidation was effected in pursuance of the statute. This court held that, under these circumstances, the issuing of bonds to the consolidated company was lawful.

In *Harter v. Kernochan*, 103 U. S. 562, at October term, 1880, bonds had been voted by the township of Harter in Clay county, Illinois, as a donation to the Illinois Southeastern Railway Company, and were issued to the Springfield & Illinois Southeastern Railway Company, the latter company having been formed subsequently to the vote, by consolidation between the former company and another company. This court held that the statutes of Illinois, existing when the vote was taken, authorized the consolidation, and that, upon such consolidation, the new company succeeded to all the rights, franchises and powers of the constituent companies. The court said (p. 574): "The power in the township to make a donation to aid in the construction of the Illinois Southeastern Railway was also a privilege of the latter corporation, and that privilege, upon the consolidation, passed to the new company. The donation was voted before the consolidation took effect, and since the consolidation the new company did not propose to apply such donation to purposes materially different from those for which the people voted in 1868; its right to receive the donation, at least when the township assented, can not be doubted." The validity of the bonds was upheld.

In *New Buffalo v. Iron Company*, 105 U. S. 73, at October term, 1881, the suit was brought on bonds and coupons issued by the township of New Buffalo, in the county of Berrien and State of Michigan. The bonds had been voted by the township in May, 1869, as a donation in favor of the Chicago & Michigan Lake Shore Railroad Company. When the bonds were voted there was in force a general statute under which any railroad company of the state, forming a continuous or connecting line with any other railroad company in or out of the state, could consolidate with the latter. The statutes provided that the new corporation should possess all the powers, rights and franchises conferred upon its constituent corporations, and that they should be deemed to be transferred to and vested in it. After the vote was had the company to which the bonds were voted was consolidated with another company into a new corporation, having the name of the Chicago & Michigan Lake Shore Railroad Company. The point was taken in this court that the bonds were void because they were delivered to a company to which they were not voted. The court said: "The only remaining objection to the judgment is that the bonds were delivered to the consolidated company, when they were not voted to that company. We concur with the court below in holding that the aid voted must be deemed to have been given in view of the then existing statute authorizing two or more railroad companies forming a continuous or connecting line to consolidate and form one corporation, and investing the consolidated company with the powers, rights, property and franchises of the constituent companies. *Nugent v. Supervisors*, 19 Wall. 241; *County of Scotland v. Thomas*, 94 U. S. 682; *Town of East Lincoln v. Davenport*, 94 U. S. 801; *Wilson v. Salamanca*, 99 U. S. 504; *Empire v. Darlington*, 101 U. S. 87; *Menasha v. Hazard*, 102 U. S. 81; *Harter v. Kernochan*, 103 U. S. 562; *County of Tipton v. Locomotive Works*, 103 U. S. 523. The bonds were, therefore, rightfully delivered to the new or consolidated corporation." This court affirmed the judgment against the township.

The new trial was directed by this court in *County of Bates v. Winters*, 97 U. S. 83, took place and resulted in another judgment against Bates county, which was brought before this court in *Bates County v. Winters*, 112 U. S. 325, at October term, 1884. The bonds were issued by the county court on behalf of the



township. This court held that at the second trial an acceptance by the Lexington, Chillicothe & Gulf Railroad Company of the subscription to the stock had been shown, which made the subscription complete and binding as a subscription to the stock prior to the consolidation, the judgment in *County of Bates v. Winters*, 97 U. S. 83, having been reversed because it did not appear that the county court had actually subscribed to the capital stock of the Lexington, Chillicothe & Gulf Railroad company before the consolidation. This court held in the case in 112 U. S., that the valid subscription made prior to the consolidation rendered unnecessary a subscription to the stock of the consolidated company, which latter subscription is held, in *Harshman v. Bates County*, 92 U. S. 569, and *County of Bates v. Winters*, 97 U. S. 83, to have been invalid. In the case in 112 U. S. this court went on to say: "As the Lexington, Chillicothe & Gulf Company was organized under the general railroad law of Missouri, which authorized consolidations, the subsequent consolidation of that company with another, organized under the same law, did not avoid the subscription which was made to its stock on the 17th of June, and the bonds in payment of the subscription were properly delivered to the consolidated company. This has been many times decided. *New Buffalo v. Iron Company*, 105 U. S. 73, and the cases there cited." This court held the bonds to be valid.

We do not think that the rigid rule laid down in the case of *Harshman v. Bates County*, 92 U. S. 569, ought to be applied to the present case, although it is a case of bonds issued by a county court in the State of Missouri on behalf of township of the county. In the articles of association of the St. Louis, Chillicothe & Omaha Railroad Company it was declared that the object of the association was to construct, maintain, and operate a railroad for public use, from Chillicothe to such point on the boundary line between Missouri and Iowa as should be deemed, after actual survey, to be on the most direct and feasible route for constructing, maintaining and operating a railroad between Chillicothe and Omaha in Nebraska; and, by the same articles, it was provided that the association was organized under and subject to the laws of the State of Missouri contained in Chapters 62 and 63 of Title XXIV of General Statutes of Missouri of 1865, possessing all and singular the powers therein contained. The St. Louis,



Council Bluffs & Omaha Railroad Company, in Iowa, was formed in September, 1870, to construct a railroad from Council Bluffs, in Iowa, to the state line between Iowa and Missouri, at a point where the Chillicothe & Omaha Railroad should reach such state line, and, in the event of the consolidation of the Iowa corporation with the Chillicothe & Omaha Railroad Company (which was the new and changed name of the St. Louis, Chillicothe & Omaha Railroad Company), then, in connection with that company, "to form a continuous line of railroad from the city of Omaha, in the State of Nebraska, and the city of Council Bluffs, in the State of Iowa, to the city of St. Louis, in the State of Missouri." The consolidation thus contemplated took place. The new company was called the St. Louis, Council Bluffs & Omaha Railroad Company, and the bonds were issued to it. They were issued as negotiable securities, to pay for the subscriptions voted to the stock of the Missouri corporation. The vote was that they should be issued in accordance with the law regulating subscriptions by municipal townships to railroad companies, in payment of a subscription to be made on behalf of the township of Chillicothe to the stock of the Missouri company. The object of the consolidation was stated in the articles of consolidation to be to consolidate the two companies into one "for the purpose of constructing, owning, maintaining, using, and operating a continuous line of railroad from the city of Omaha, in Nebraska, and the city of Council Bluffs, in Iowa, to the city of Chillicothe, in Missouri, under the name of the St. Louis, Council Bluffs & Omaha Railroad Company."

The vote of the people to subscribe to the stock, followed by the issue of the bonds, was an adoption of the articles of the association of the Missouri company, not only with the powers and purposes expressed in those articles, and conferred by then existing statutes, but with all powers which had, prior to the vote, been conferred upon it by statute. The intention and purpose of the voters of the township in voting, and of the county court of the county in issuing the bonds were fully carried out in what was done. The vote of the people contemplated and authorized the very thing that was done. The bonds were voted for the express purpose of constructing a road from Chillicothe to the boundary line between Mis-

souri and Iowa, with a view to continuing the road from such boundary line to Omaha, in Nebraska. This object was attained by means of the consolidation. The road was constructed by the consolidated company from Chillicothe to the boundary line between Missouri and Iowa, through the counties of Missouri named in the articles of association of the Missouri company, and was continued thence to Omaha, in Nebraska, and has ever since been operated upon that line. The object expressed in the articles of association of the Missouri company, of having a continuous road from Chillicothe to Omaha, was not only effectually accomplished by the consolidation, but could not have been accomplished without it. The Missouri corporation could not have built the road in Iowa from the state line to Council Bluffs, and a railroad extending only from Chillicothe to the state line would not have answered the purpose contemplated. To say, therefore, that there has been any substantial diversion in the use of the bonds from the purpose contemplated by the vote of the people of the township, because of the consolidation and of the issuing of the bonds to the consolidated company, which has made the very road intended, because the authority conferred by the vote was nominally one only to issue bonds to the Missouri corporation, is not a sound proposition, in view of the fact that the statute of Missouri expressly authorized the consolidation which took place. Under the facts of the case, the provision for consolidation became a part of the contract between the township and the railroad company, and the vote to issue the bonds to the company was an assent to the exercise by it of all the corporate powers, including that of consolidation, with which it was invested at the time of the vote. So true is this, that, if the Missouri company had never been consolidated with the Iowa company, and the road had only been built to the state line, and no extension of it through Iowa to Council Bluffs and Omaha had been made, it might well have been urged that the citizens of the township had been defrauded, and that the purpose in issuing the bonds had not been carried out.

We think that, in the present case, the rule applied in the cases before cited, of *County of Scotland v. Thomas*, 94 U. S. 682; *Town of East Lincoln v. Davenport*, 94 U. S. 801; *Wilson v. Salamanca*, 99 U. S. 499; *Menasha v. Hazard*, 102 U. S. 81; *Harter v. Kernochan*, 103 U. S. 562; *New Buffalo v. Iron*

Company, 105 U. S. 73; and *Bates County v. Winters*, 112 U. S. 325, is the more proper and salutary one, and that the doctrine laid down in *Harshman v. Bates County*, 92 U. S. 569, and in the *County of Bates v. Winters*, 97 U. S. 83, that a county court in Missouri could not, on a vote by a township to issue bonds to a corporation named, issue the bonds to a company formed by the consolidation of that corporation with another corporation, would not be, if applied here, a sound doctrine.

(3.) As to the objection that it does not appear by the findings of the circuit court that there was any formal order made by the county court for the issue of the bonds. By § 51 of the statutes, before cited, it was provided that if it should appear from the returns of the election that not less than two-thirds of the qualified voters voting at the election were in favor of the subscription to the stock of the railroad company, it should be the duty of the county court to make the subscription in behalf of the township, according to the terms and conditions thereof, and that, if those conditions provided for the issuing of bonds in payment of such subscription, the county court should issue such bonds in the name of the county and deliver them to the railroad company. This imposed a plain duty, in the present case, upon the county court, because the statute and the vote, taken together, authorized the subscription and the issue of the bonds, and no formal order by the county court to do those acts was necessary. The acts were ministerial. The statute left no discretion in the county court, but made it the duty of the court to make the subscription and issue the bonds. The sole duty of the court was to ascertain that the proper vote had been had.

The bonds state on their face that they are "issued under and pursuant to an order of the county court of Livingston county, authorized by a two-thirds vote of the people of Chillicothe municipal township," and each bond also states that the county has executed it by the presiding justice of the county court of the county, under an order of the court, signing his name to the bond, and by the clerk of the court, under the order thereof, attesting the same and affixing thereto the seal of the court, and it is so signed and attested and the seal is affixed.

Moreover, the finding of the circuit court is, that the records

of the county court show that the court made an order, on the 21st of February, 1877, stating that, under and by virtue of the statute of the state, approved March 23, 1868, the county of Livingston, for the use and in behalf of the municipal township of Chillicothe, had issued and delivered the bonds in question to the St. Louis, Council Bluffs & Omaha Railroad Company. It is also found as a fact by the circuit court, that the county of Livingston had made eleven semi-annual payments of interest on the bonds, from the proceeds of taxes levied in each year on the taxable property of the township.

- The county court having been designated by the statute as the proper authority to determine that the conditions existed which authorized the making of the subscription, to be followed by the issuing of the bonds, the fact of the issue of the bonds by the county court, under its seal, with the recitals contained in the bonds, and the other facts above stated, estop the county from urging, as against a *bona fide* holder of the bonds and coupons, the existence of any mere irregularity in the making of the subscription or the issuing of the bonds. On the foregoing facts, it must be presumed that the subscription to the stock was made by the county court in behalf of the township, and the county is estopped from asserting the contrary.

We are referred by the counsel for the plaintiff in error to the cases of *The State v. Garrouette*, 67 Missouri 445, and *Weil v. Greene County*, 69 Missouri 281, as holding to the contrary of the views we have here announced. Independently of the fact that these decisions were made in 1878, many years after the bonds in the present case were issued, no such facts existed in those cases as exist in the present case. In the case in 67 Missouri, the bonds were issued to the Hannibal & St. Joseph Railroad Company, to aid in building the Kansas City & Memphis Railroad, alleged to be a branch of the former road. The main line had never been built. The court said that a branch road necessarily presupposed a main trunk line, and that the Kansas City & Memphis Railroad was, for all practical purposes, really a distinct and independent branch of the Hannibal & St. Joseph Railroad, the union existing merely in name but not in substance, and the branch road having separate stocks and stockholders, president, directors, and liabilities from the main road, so as to require, under the constitu-

tion of Missouri of 1865, a vote of the people in favor of the issue of the bonds.

There was no vote of the people in that case. In the case in 69 Missouri, the bonds had been issued by Greene county to the Hannibal & St. Joseph Railroad Company, to aid in building the road through that county. The case did not show that there was any connection between the Hannibal & St. Joseph Railroad Company and the railroad to be built, nor what railroad it was, nor that Greene county had ever subscribed to the stock of any railroad company.

The exceptions taken on the trial, as above set forth, do not present any question different from those which have been discussed. The bonds and coupons were properly read in evidence, and so were the certified copies of the tax levies.

We find no error in the record, and the judgment of the circuit court is affirmed.<sup>1</sup>

## SECTION TWO.

**Georgia P. R. Co. v. Wilks, 86 Ala. 478; 6 Southern 34.**

**The consolidation acquires the power to hold land.**

Railroad companies possessed of the power to acquire and hold land may, by consolidation, confer that power upon the new company thus created, but only when such company comes under the restriction of the statute, which says that the new company shall have the powers, rights and franchises conferred upon the two or more corporations, in case the two or more railroads, or contemplated railroads, should bear such relation to each other or to the general enterprise that when completed they may admit the passage of burden or passenger cars over two or more of such roads continuously, without break or interruption.

<sup>1</sup>Consolidation being authorized are thereafter estopped from asserting, as against innocent holders, that bonds to the consolidation upon ascertaining that the terms of subscription had been complied with, they there had been no compliance. *Denison v. Mayor, etc.*, 62 Fed. 775.

## SECTION THREE.

**Toledo, Ann Arbor & Grand Trunk Ry. Co. v. Dunlap et al., 47 Mich. 456.**

**Consolidation succeeds to power to condemn land.**

Appeal from proceedings to condemn lands. The property is the same included in the proceedings set aside at the June term, 1881.<sup>1</sup> The present company purports to be a consolidation of the former petitioning company and another. The new organization, as such, is undoubtedly a Michigan corporation. How far, as such, it could act abroad does not matter here. It possesses the powers belonging to that particular corporation which had authority before the union to institute proceedings to reach this particular land; and this is all that is now under inquiry. We have no occasion to look further.<sup>2</sup>

## SECTION FOUR.

**Pittsburgh, Fort Wayne & Chicago R. R. Co. v. Reich, 101 Illinois 157.**

**Consolidation is assumed to have right of original company to use street.**

Suit for damages against the Pittsburgh, Fort Wayne & Chicago Railroad Company, on account of constructing its road upon an avenue along plaintiff's lot, and so occupying the avenue as to make it impassable. Defendant claimed authority from the State of Illinois for such construction. Statutes examined and found not to grant any such authority. Defendant is a consolidated company formed by necessary legislation of each state, out of corporations of Pennsylvania, Ohio, Indiana and Illinois, respectively. The charter of the original Illinois corporation conferred upon it in this regard all the powers expressed in the general railroad act,<sup>3</sup> and provided

<sup>1</sup> *Dunlap v. Toledo, Ann Arbor & Grand Trunk Ry. Co.* was held void, there being no proof of connection of these two, although the *Northeastern Railway Company*, 46 Mich. 190.

<sup>2</sup> But it is necessary for the succeeding corporation to connect itself with its predecessor; thus, a sheriff's deed to the "Globe Investment Company, formerly Dakota Mortgage Loan Corporation," was held void, there being no proof of connection of these two, although the certificate of sale had been to the *Dakota Mortgage Loan Corporation*. *Hannah v. Chase* (N. D.), 61 N. W. R. 18.

<sup>3</sup> Approved November 5, 1849.

for estimating the value of appropriated land in case no agreement could be reached with the owner; and also gave the company power to construct its road upon or across any road or highway which the route of its road shall intersect, the corporation to restore the road or highway thus intersected to its former state, or in a sufficient manner not to have impaired its usefulness. Provision was also made for acquiring land belonging to the public, or to any county or town, by an agreed compensation, if could be; otherwise by law.

Under these circumstances, the commissioners of highways of the town of Lake quit-claimed the avenue in question to the defendant for use of its railroad. This quit claim is held unauthorized and void.

No question seems to have been made or discussed as to whether the consolidated company would have the rights of the original Illinois corporation. The court goes on the assumption that it would, and shows that such right is not an exclusive one to the street, but only to use it in conjunction with the public and in such a manner as not to impair its usefulness as a public highway. The subsequent legislative act to perfect the title of the defendant to its road, being made three years after the commissioner's deed is not intended to be retroactive, and relates altogether to giving the defendant the various rights and powers in its corporate capacity which the constituent companies possessed.

#### SECTION FIVE.

**Matter of Prospect Park and Coney Island R. R. Co., 67 N. Y. 371.**

**Consolidation may acquire title to lands.**

Application by the Prospect Park & Coney Island Railroad Company to acquire title to lands.

The act of 1874<sup>1</sup> gave power to one of the corporations, which now together form the corporation which is the petitioner in this case, to consolidate with any other like corporation. The point of the appellants, that no power to consolidate is given to the other of those corporations, is without effect. Power is given by statute to one corporation to form

<sup>1</sup> Laws of 1874, Chap. 448, pp. 591, 592, § 3.



a consolidation with *any other*. It can not form a consolidation unless it finds another with which to unite, and which is capable of union with it; hence, whatever other company it selects for a union, and finds willing to join it, that other company, though not named in the statute, gets power from the statute to unite with that company which the statute names.

### SECTION SIX.

**California Central Ry. Co. v. Hooper**, 76 Cal. 404; 18 Pacific R. 599.

**Consolidation is to be substituted in condemnation proceedings.**

The San Diego Central Railroad Company having instituted condemnation proceedings, thereafter was consolidated with several other roads and the consolidation incorporated under the name and style of the California Central Railway Company, which company was thereupon substituted as petitioner in the proceedings, to which substitution the defendants objected. The substitution was made under the section of the code which provides that an action or proceeding does not abate by the death or any disability of a party or by the transfer of any interest therein, if the cause of action survive or continue. In case of death or disability the successor or representative was to be substituted; and in case of any other transfer of interest the court may allow the transferee to be substituted. Defendants contended that upon the consolidation occurring the old company which had instituted the proceedings "died," and hence, that the proceedings died with it; and relied upon the rule in *Shields v. Ohio*, 95 U. S. 319. The court finds that it is unimportant whether the old corporation ceased to exist for every purpose immediately on consolidation or not. The power of eminent domain has never been transferred to the corporations by the state; it is exercised by the former only as agents for the state, to obtain lands for a use which the legislature has declared to be public purpose, namely railroad.

The legislature, which has power to name the agent, has power to provide for the transmission of the agency during the pendency of an action by the change of the plaintiff, at least, where, as here, the substituted plaintiff has acquired all the

rights, powers and franchises of the original plaintiff. This agency is in its nature an office; the corporation is prosecuting the proceedings as trustee for the state; it is "in charge of the public use for which the condemnation is sought." The action does not abate by death, nor disability, nor transfer, in case the transfer is provided for by statute, and the transferee is in all respects the successor to the interest, both so far as the same is direct and as the original party had charge of the public use. Certainly the right of the successor, if the law intends him to be the successor, to prosecute the action, is not affected by the mere circumstance that the original plaintiff becomes disabled or goes out of existence by the process which operates a transfer of the interest of the original plaintiff and brings the successor into life. The case of *Mahony v. Water Works Co.*, 52 Cal. 162, is distinguished on several grounds, one of which is that the original petitioner assigned its rights to individuals, whereas the statutory proceedings could be commenced and prosecuted under the particular statute, only by corporations, and furthermore, what was said in this respect in that case was not strictly necessary to the judgment.

#### SECTION SEVEN.

**Southern Pacific R. Co. v. Poole; Same v. Davis, 82 Federal 451.**

**Consolidation entitled to rights of original company; manner of devolution is immaterial.**

The Texas Pacific Railroad Company was incorporated under act of congress of March 3, 1871; the same act authorizes the Southern Pacific Railroad Company, of California, to build a certain railroad to connect with it; the same act grants to the company in aid of the work "the same rights, grants and privileges as were granted to the Southern Pacific Railroad Company, of California, by the act of July 27, 1866," incorporating the Atlantic & Pacific Railroad Company. These various acts<sup>1</sup> show a land grant to the company in question and its successors and assigns, of every tenth section of land upon filing a map showing its selection. By general acts<sup>2</sup> any

<sup>1</sup> 16 St. 579, § 28; 14 St. 299, § 18; 14 St. 1869-70, 107.  
St. 294, § 8.

corporation already formed, or thereafter to be formed, is authorized to amend its articles by making and filing amended articles in the same office where the originals were filed; such corporations are also authorized to consolidate into one, carrying with them all the assets, rights, etc., to the consolidated corporation. The Southern Pacific promptly filed its map, and to set all doubts at rest, and to be able to build its roads in accordance with the law of California, amended its articles by adding one in which it stated its object to be to construct sundry lines of road, describing them and showing their locations along the land in question. These amendments were adopted immediately after the passage of the Texas Pacific Act and as soon as it could be known where the point of connection between these lines would be.

The Southern Pacific also passed a resolution accepting the land grant and forwarded the same to the Secretary of the Interior at Washington. The defendant asserts that the land grant is invalid; for the reason, among others, that upon the amendment of the articles of association and the consolidation with other corporations, but under the same name, a new corporation was created, which built the road, and that it was not, therefore, the same as the one to which the grant was made. Conceding, for the argument, this to be technically correct, the court shows that the grant need not fail, because the company which built the road is the successor in interest of the one to which the grant had been made. So far as the amendment is concerned, the corporation is really the same, with enlarged powers or larger scope in its purposes, else it would not be an amendment, but a dissolution and creation of another independent corporation. It is certainly contemplated by the statute that the corporation with the amended articles shall continue to hold all the property of the former and be charged with all its liabilities. So the consolidated corporation was designed to merge all the property assets, rights, franchises and liabilities of the former corporations which are the constituents of the new ones. The acts recognize that the land is granted to the company, its successors and assigns.<sup>1</sup> If the consolidated company is not technically the same as the original grantee

<sup>1</sup> Secs. 2 and 18 of the Atlantic and Pacific Act; § 28 of the Texas Pacific Act, giving the Southern Pacific the same grants as the other road had.

company, it is substantially and practically so. If not, it is, certainly, its successor or assign, and is thus within the express provisions of the grant.

SECTION SEVEN (Continued).

**Pennsylvania & N. W. R. Co. v. Harkins (Pa.), 24 Atl. 175.**

Similar reasoning is used to show that it makes little difference in what capacity the succeeding corporation be considered; the case is substantially thus: A bond was made by agent of the Bell's Gap R. R. Co., to secure faithful performance of his duties. The Clearfield & Jefferson Ry. Co. became consolidated with former company; statutes and articles of consolidation construed, and former company held to be the absorbing company, under new name of P. & N. W. R. Co., and agent and his sureties held liable to a suit by the consolidated company, although default happened after the consolidation. The consolidation and merger acts<sup>1</sup> provide that on complying with certain prerequisites, the "merger shall be deemed to have taken place, and the said companies to be one corporation, possessing all the rights, privileges and franchises theretofore vested in either of them; and all the property, real, personal and mixed, and debts due and rights of action, shall be deemed and taken to be transferred to and vested in the company into which such merger may have been made, without further act or deed." "There is nothing in the act of 1861 which recognizes the creation of an entirely new, distinct and separate corporate body chartered by the commonwealth. The reverse is true, and the language is express that all the rights of the one company so chartered, pass into and merge in the other railroad company so chartered." The change of name to Pennsylvania & Northwestern Railroad Company makes no difference; no charter was ever to it issued. The action, if need be, could be to the original company, for use of this company; or this company, even if it be a new one, could own the bond as successor to the old one. The corporate existence of the absorbing company, the Bell's Gap company, is preserved under a new name; the bond is payable to it, its attorney, successors or assigns. The Bell's Gap company still operated exactly the same line;

<sup>1</sup> 16th of May 1861, P. L., p. 702.

no limit of time was made in the condition of the bond; it provided also for "such other duties as may from time to time be assigned to or devolve upon him as such agent." Even if it be admitted that the old companies were dissolved, the sureties were not affected; the change would be only such as the existing statutes contemplated might be made.

### SECTION SEVEN (Continued).

**Phinzy v. Augusta & K. R. Co., 62 Fed. Rep. 678.**

The court, in sustaining an issue of bonds made by a consolidation, regards the question of its due incorporation as immaterial and not to be gone into: "It must be kept in mind that the consolidation of railroads does not create a new corporation, with powers of its own, distinct from, greater or less than those enjoyed by the consolidating companies separately. It is a method provided by law for the formation of a copartnership between railroad corporations, by which, if the expression may be used, they pool their franchises and property, and are enabled to act in complete harmony under one head, as a unit. This unit possesses the powers of its component parts—no more and no less."

### SECTION EIGHT.

**Abbott v. New York & N. E. R. Co. (and other cases), 145 Mass. 450; 15 N. E. 91.**

#### **Foreign consolidation held entitled to condemn lands.**

Suit in trespass against defendant railroad company charging it with unauthorized use of a strip of land. Defendant justified as the successor of the Boston, Hartford & Erie Railroad Company,<sup>1</sup> which latter company had located its road on the tract in question on March 30, 1866. Being then only a Connecticut corporation with no charter from Massachusetts, it had taken a deed from the Southern Midland Railroad Company (whose projected road ran through the premises in question), purporting to convey the franchises and property of said company; there had also been some legislation, but it is con-

<sup>1</sup> St. 1873, C. 289.

tended that it was not sufficient to confer the power of eminent domain upon the defendant, a foreign corporation.

The question of the power of the Boston, Hartford & Erie to make the location in 1866 is difficult. It is conceded that the power in question may be given to foreign corporations.<sup>1</sup> A corporation may, with consent of the legislature, take this power as *quasi* successor of the corporation to which it was originally granted; and it is not very material whether such consent is regarded as authorizing the transfer of the old power or, more strictly, as delegating a new power on the same terms as the old.<sup>2</sup> The substance of the transaction is seen in cases of consolidation.<sup>3</sup> But there is nothing in reason to confine it to such cases.<sup>4</sup>

When the power is claimed under a transfer, the legislative grant is more readily inferred, because by the original grant the use has already been adjudicated to be public.<sup>5</sup> The power can not be transferred in Massachusetts without legislative consent. Some courts, however, doubt whether such consent is necessary, the transfer being merely a *delectus personarum*, of little theoretical importance, and the least determining element in the more common cases where the power is conferred.<sup>6</sup> This reasoning is of equal force whether such power is properly called a franchise or not.<sup>7</sup> Such consent may be by way of ratification of what purports to be a transfer already executed.<sup>8</sup>

<sup>1</sup>Citing: *Re Townsend*, 89 N. Y. 171; *R. R. Co. v. Young*, 33 Pa. St. 175; *Stone v. Sherman*, 22 Ohio St. 411-434; *Railroad Co. v. Telegraph Co.*, 46 Ga. 43, 51; *Gilmer v. Lime Point*, 18 Cal. 229, 251, 255; *Clark v. Barnard*, 108 U. S. 436, 452; 2 S. C. R. 878; *Burt v. Ins. Co.*, 106 Mass. 356; this last case holding that the power may be conferred on the United States Government is criticised in *Kohl v. U. S.*, 91 U. S. 367, 378; see also *Darlington v. U. S.*, 82 Pa. St. 382.

<sup>2</sup>See *State v. Sherman*, 22 Ohio St. 411, 428.

<sup>3</sup>*Railroad Co. v. Railroad Co.*, 1 Gray 840.

<sup>4</sup>*Atkinson v. Railroad Co.*, 15 Ohio St. 21; *Coe v. Railroad Co.*, 10 Ohio St. 372, 387; *Hall v. Railroad Co.*, 21 Law Rep. 138, 141.

<sup>5</sup>*Black v. Canal Co.*, 22 N. J. Eq. 130, 402; *Braslin v. Railroad Co.*, 145 Mass. 64, 67; 13 N. E. R. 65; *Com. v. Smith*, 10 Allen 448.

<sup>6</sup>*Shepley v. Railroad Co.*, 55 Me. 395, 407, 492; *Bickford v. Railway Co.*, 1 Can. Sup. Ct. 696, 738.

<sup>7</sup>*Coe v. Railroad Co.*, 10 Ohio St. 372, 387; *Railroad v. Dunbar*, 95 Ill. 571; *Pierce v. Emery*, 32 N. H. 484, 507, 511, 513.

<sup>8</sup>*Shaw v. Railroad Co.*, 5 Gray 162, 180; 16 Gray 407, 410; *Railroad Co. v. Cowdrey*, 11 Wall. 459.

And it may be gathered by implication from a series of acts.<sup>1</sup> The several acts of the legislature, whereby the existence, location, operation, power to mortgage, and other powers of the defendant have been recognized ever since 1866, must serve as a ratification of the transfer by its grantor to it of all the grantor's powers, including that of eminent domain. This is especially so from the act<sup>2</sup> which mentions the defendant as "acting within this commonwealth" and recognized by act of legislation, and it is "declared to be a corporation by that name, and vested with all the franchises, powers," etc., set forth in the general law and ratifies its union with some corporations of other states. This seems intended to make it a Massachusetts corporation.<sup>3</sup> The act also substitutes the defendant for its grantor, vesting it with all the franchises, powers, etc., and subjecting it to all the duties and liabilities of the grantor. The commonwealth, the legislature, and the plaintiff himself have for over twenty years gone on the assumption that the defendant had a good title to its road, and all the powers which it professed to have, and have dealt with it accordingly.

Large sums of money by way of mortgage, and otherwise, have been placed upon this reliance, and the courts should be slow to pronounce the legislature mistaken in a matter resting wholly within its will when, for so long a time, everything has been conducted on that footing. The location is held valid.

#### SECTION NINE.

**University of Vermont and State Agricultural College v. Chester Baxter's Estate, 42 Vt. 99; 43 Vt. 645.**

**Assignment of chose in action is effected by the union of the corporations.**

Notes were executed to the University of Vermont; that corporation and another were united under the plaintiff's name, and as such bring the suit.

The statutes declare that upon the organization of the new corporation and upon certain votes being had, all the property of each of the former should be vested in it; it is held that the real estate vested by the terms of the statute, but that the

<sup>1</sup> Freight Company v. Railroad Co.,  
18 Allen 422.

<sup>2</sup> Statutes 1868, Ch. 145.

<sup>3</sup> Statute 1874, C. 384.



statute was silent as to the personalty; nevertheless the same, although without assignment, also vests in the new corporation, and by virtue of the statute the plaintiff is substituted for the original payee and may bring suit as such. This, though not the rule when a chose in action is transferred by an individual, is so in case of transfer or assignment made by means of statute or a grant by the crown; in such case, whether the chose is negotiable or not, the title vests in the transferee, "from a general rule of law, not from the custom of merchants, or any special custom."<sup>1</sup>

The facts showing the new incorporation should, however, be alleged in the declaration, as an assignment should be alleged in a transfer between individuals.

#### SECTION TEN.

**Cashman v. Brownlee**, 128 Ind. 266; 27 N. E. 560.

**Title of constituent's realty vests, ipso facto, in consolidation.**

Title to the real estate of the constituent companies vests, *ipso facto*, in the new corporation; the new company succeeds to all the rights of each of the constituent companies<sup>2</sup> and its grantee may recover the real estate in controversy without said company having any deed thereto from the original company.

#### SECTION ELEVEN.

**Tarpey v. Deseret Salt Co.**, 5 Utah 494; 17 Pacific 681.

**Foreign consolidation acquires title to real estate by the articles of association.**

Ejectment brought by Tarpey against the Deseret Salt Company. Plaintiff claimed under a grant by congress to the Central Pacific Railroad Company, of California, which was amalgamated and consolidated with the Western Pacific Railroad Company, under the name of the Central Pacific Railroad

<sup>1</sup> *Lambert v. Taylor*, 4 B. & C. 138 (10 E. C. L. 515); *King v. Twine et al.*, 2 Cro. Jac. 179; 2 Bl. Com. 442, 485; *R. R. Co.*, 30 Pa. St. 42; *Paine v. Pa. Amherst Academy v. Cows*, 6 Pick. 427; *Sherman v. Estate of Dodge*, 28 Vt. 26. <sup>2</sup> Citing *Rorer on Railroads*, page 88, Vol. 1; *Beach, Ry.*, § 553; *Lauman v. R. R. Co.*, 31 Ind. 288; *R. R. v. Jones*, 40 Ind. 87; *R. R. Co. v. Hendricks*, 41 Ind. 48.

Company, which, in turn, amalgamated with a number of others, retaining the same name. Defendant contended, among other things, that the lands were not conveyed by the original grantee to the first amalgamated company, nor by that company to the second; the form and language of the articles of association are insufficient for that purpose, nor are the laws of California proved under which the amalgamated companies, and the constituent companies composing them, were organized, showing their legal right to organize, or to hold and convey property, nor is there proof of the necessity for such property being held for corporate purposes.

Upon these defenses it is held that the articles of association are sufficient in form to effectuate the transfer of the property; they state that "the several parties, each for itself, hereby sells, assigns, transfers, grants, bargains, releases and conveys to the said new and consolidated company and corporation, its successors and assigns, forever, all its property, real, personal and mixed, of every kind and description; and all rights, privileges and franchises, corporate and otherwise, held, owned or claimed by said parties of the first and second parts, or either of them, in possession or expectancy, either at law or in equity, subject, however, to all conditions, obligations, stipulations, contracts, agreements, liens, mortgages, incumbrances, claims and charges thereon, or in anywise affecting the same."

Proof of the laws of California was not necessary; the corporations are not parties to the record; their existence and powers are not directly in issue; defendant is in no way in privity with them. Proof that they are corporations *de facto* is all that is needed, and is supplied by the duly signed, sealed, acknowledged and proved articles of incorporation.<sup>1</sup>

All the companies are recognized as *de facto* and some *de jure* by the various acts relating and referring to them. It is not necessary to prove the California law authorizing them to take real estate. Transfers of property to or by corporations having no such authority, are not void but only voidable, at the instance of the government in a direct proceeding for that purpose.<sup>2</sup> Authorities differ whether transfers which are expressly

<sup>1</sup> 2 Mor. Priv. Cor., 746, 750, 776-778. § 121; Telegraph Co. v. Telegraph

<sup>2</sup> 2 Mor. Priv. Corp., 6 48-653 in- Co., 22 Cal. 398; Water Co. v. Clar-  
clusive, 709-711, 746; 1 Devl. Deeds, kin, 14 Cal. 544; Bank v. Matthews,

prohibited by legislative enactment are void, but the burden of showing that there is such prohibition is on the party attacking the transfer.<sup>1</sup>

The question was purely collateral; defendant could not attack the fully executed contracts, at least without showing that they were wholly and absolutely void.<sup>2</sup> The rules are the same as to foreign corporations; their power to hold and convey property is to be determined by the laws of the state where the property is situated.<sup>3</sup> It is a question only between the corporation and the government wherein the property lies. If lands acquired by a foreign corporation are liable thereby to be forfeited to the government under which it is organized, the foreign government might in this indirect way acquire property in another government's domain, which might not be permitted.

By general comity, a corporation of one state may hold property and transact business in another; if a state does not permit it, it should be expressed in some affirmative way by the state wherein the property lies.<sup>4</sup> The deeds or transfers of these corporations duly executed, sealed and proved, are sufficient *prima facie* proof of title. Even in a case in which the corporation was a party, it has been said: "It would lead to infinite inconvenience and embarrassments, if, in suits by corporations to recover the possession of their property, inquiries were permitted as to the necessities of such property for the purposes of their incorporation, and the title made to rest upon the existence of such necessity;<sup>5</sup> hence, still more, if the title to every piece of land traced through a corporation were made to depend upon such necessity, or on the legality of its incorporation, or on its power to take real estate, it would tend to lessen the value of corporate franchises, and to impair the marketable value of lands thus situated by reason of the difficulties in determining the title.

98 U. S. 628; *Leazure v. Hillegas*, 7 Serg. & R. 813; *Banks v. Poitiaux*, 15 Am. Dec. 706; *Oil Co. v. Railroad Co.*, 32 Fed. Rep. 22. <sup>2</sup> *Runyan v. Coster's Lessees*, 14 Pet. 122; *Bank v. North*, 4 Johns. Ch. 870; *Lumbard v. Aldrich*, 28 Am. Dec. 381.

<sup>1</sup> *Burrill v. Bank*, 35 Am. Dec. 395.

<sup>4</sup> *Cowell v. Springs Co.*, 100 U. S.

<sup>3</sup> *Devl. Deeds; Water Co. v. Clarkin*, 14 Cal. 544; *Banks v. Poitiaux*, 15 Am. Dec. 706. <sup>5</sup> *Water Co. v. Clarkin*, 14 Cal. 544.

## SECTION TWELVE.

**Georgia Pacific Ry. Co. v. Gaines, 7 So., 882; 88 Ala. 877.**

**Consolidation takes constituent's power to hold lands.**

A company formed by the consolidation of other companies will thereby become possessed of all the powers, rights and franchises of these other companies, and these powers will include the power to acquire and hold land; but such power is limited by the charter to such lands as may be granted to aid in the construction of the road, and the right of the new company to succeed to the powers and rights of the old companies is, by statute, limited to those companies the lines of which when completed may admit passage of burden or passenger cars over any two or more of such continuously, without break or interruption.

## SECTION THIRTEEN.

**Scott et al. v. Hanshear, 94 Ind. 1.**

**Consolidation entitled to tax voted by township to a constituent company.**

Action by taxpayers against the officers of a township to enjoin collection of a tax voted in aid of a railroad company. Bill dismissed, dismissal affirmed.

One ground of complaint was that after the appropriation had been voted in aid of the designated railroad, the railroad company had consolidated under and in conformity with the laws of Indiana and of Michigan with certain railroad corporations of the latter state; that by force of such consolidation said company "ceased to exist from and after the 29th day of September, 1881, and that since the day last named there was and had been no railroad company in existence authorized by law to take and receive such appropriation." This is claimed on the theory that at the time of the consolidation "the railroad company theretofore existing had no right to or interest in the appropriation voted which would pass to or vest in the consolidated company," and this is based on the repeated decisions of this court that the company acquires no

right or interest in the appropriation, "which it can enforce or protect by suit in its own name, until, at least, the money appropriated has been collected." These decisions rest on the constitutional provision which is applicable to *counties*;<sup>1</sup> there is no such prohibition as to *townships*.<sup>2</sup> A subscription not exceeding two per cent of the value of its taxable property made by a township becomes a binding obligation<sup>3</sup> from which it is not discharged by the shrinkage in value, or the destruction of any part, of its taxable property. And in such obligation the company to which it is made acquires such a right and interest, as upon its future consolidation, will pass to and vest in the consolidated company; and this is so whether such original company did or did not cease to exist as a corporation for every purpose.

#### SECTION FOURTEEN.

**County of Green v. Connors, 109 U. S. 104; 3 S. C. R. 69.**

**Becomes entitled to bonds voted to constituent.**

A railroad corporation entitled to receive aid bonds consolidates with another, the result takes the name of the latter, and is held entitled to the bonds. The statute did not, as in other instances, expressly declare that the original company's rights, privileges and franchises were to pass over to the company with which the consolidation was to be made. If only a sale had been authorized and made, it might very plausibly have been contended that the purchasing company took and held the road under its own charter only, without the franchises and privileges connected with it in the hands of the vendor company, but "consolidation" is not sale, and when two companies are authorized to consolidate their roads it is to be presumed that the franchises and privileges of each continue to exist in respect to the several roads so consolidated. The authority given to consolidate "upon such terms as may be deemed just and proper," would include the power to transfer to the consolidated company the franchises and privileges connected with

<sup>1</sup> County can not subscribe for stock "unless the same be paid at the time of such subscription." Section 198, R. S., 1881. <sup>2</sup> *Bittinger v. Bell*, 65 Indiana 445, 457. <sup>3</sup> *Board, etc., v. State ex rel.*, 86 Ind. 8.

the road, if the law itself did not have that effect, and the court has found that this was done.”<sup>1</sup>

### SECTION FIFTEEN.

**Niantic Savings Bank v. Town of Douglas, 5 Ill. App. 579.**

**Consolidation is entitled to bonds voted to constituent.**

Bonds voted to a railroad company, and issued to the consolidated company, are claimed to have been void because the consolidation of that company with another, operated as a complete extinction of the former. But the decision is that they are valid. The law incorporating the former company, as also the general law, authorized such consolidation, and passed all the powers, rights, franchises and immunities of the old companies to the new or consolidated company.<sup>2</sup> There is no difference between a subscription and a donation; either passes to the consolidated company.

### SECTION SIXTEEN.

**Atchison, Colorado & Pacific R. R. Co. v. Commissioners of Phillips Co., 25 Kansas 261.**

**Consolidation entitled to county bonds voted to constituent.**

Mandamus by the Atchison, Colorado & Pacific Railroad Company to compel county commissioners to deliver certain

<sup>1</sup> The court cites its prior decisions 262; *Company v. Town of Barnett*, 85 Ill. 318; *Town of Pana v. Lippincott*, 2 Bradwell 466. and declines to follow the latest Missouri decisions overruling the earlier state decisions.

<sup>2</sup> Ill. *Midland Ry. Co. v. Town of Barrett*, 85 Ill. 318; *Town of Pana v. Lippincott*, 2 Brad. (Ill. App.) 466. Citations by counsel upholding the consolidated company's right to succeed to the rights and franchises of the constituent companies: *County v. Thomas*, 94 U. S. 682; *County v. Nicolay*, 95 U. S. 619; *County v. Barnes*, 94 U. S. 72; *Robertson v. Rockford*, 21 Ill. 457; *Hayes v. O., O. & F. R. V. R. R. Co.*, 61 Ill. 422; *O., O. & F. R. V. R. R. Co. v. Black*, 79 Ill. 262; *Company v. Town of Barnett*, 85 Ill. 318; *Town of Pana v. Lippincott*, 2 Bradwell 466. *Contra*: The consolidation revoked the power to donate, and it could only be revived by a new vote. *Dillon on Municipal Bonds*, 41; *Harshman v. Bates*, 92 U. S. 569; *Lewis v. Clonondon*, 7 Cent. Law Jour. 288; *Robertson v. Rockford*, 21 Ill. 457; *Hayes v. O., O. & F. R. V. R. R. Co.*, 61 Ill. 422; *Black v. O., O., etc., Co.*, 79 Ill. 262; *Henry v. Nicolay*, 95 U. S. 626; *County v. Thomas*, 3 Dillon 7; *County v. Barrett*, 85 Ill. 318; *Harshman v. Bates*, 92 U. S. 574; *Aspinwall v. Daviess Co.*, 22 How. 374,

township aid bonds voted in favor of the Atchison & Denver Company, which thereafter consolidated with certain other railway companies and formed the plaintiff company. Granted.

The consolidation did not release the township from its subscription. Defendants claim that the company to which the subscription was made went out of existence on December 22, 1879, that the construction of the railroad after December 22, 1879, was by an entirely different company, and that plaintiff has no interest in the original contract for the construction or in the subscription itself.<sup>1</sup> The case relied on was, however, different. "There no subscription had been made to the stock of the company to which the bonds had been voted. There the law authorizing consolidation reserved to each stockholder of the old companies the right to determine whether he would become a stockholder in the new corporation."<sup>2</sup> Corporations are created under general laws, but the legislature has a reserved right to change, or amend, or repeal the same.<sup>3</sup> The law of 1870 was in force when the subscription was voted, and the law at that time also authorized consolidations on approval of two-thirds of the stockholders; hence the voters, when they voted for the subscription, had notice that a consolidation with another company might be thereafter made, that their stock might be converted into stock of the new company, and that the liability which they assumed might become owing to that company. "The subscription was therefore made subject to the contingency of the consolidation." There is no claim of injury, fraud or wrong. The legislature has the power to authorize such consolidations, at least in all cases where the rights of a stockholder are not injured thereby. The consolidation did not release the township from its subscription.<sup>4</sup> The plaintiff, after December 22, 1879, was the lawful successor in interest of the company to which the bonds were voted and the stock was subscribed.

<sup>1</sup> Relying on *The State v. Commissioners of Nemaha Co.*, 10 Kansas 569. Wall. 249, 251; *The Cork & Youghal Ry. Co. v. Patterson*, 38 Eng. L. & Eq. 398; *Nixon v. Brownlow*, and *Nixon v. Green*, 3 H. & N. 686; *Sparrow v. Railroad Co.*, 7 Porter (Ind.) 369; *Bish v. Johnson*, 21 Ind. 299; *Hanna v. Cincinnati & Ft. Wayne R. Co.*, 20 Ind. 80.

<sup>2</sup> Ch. 44 Statutes of 1865; this right is omitted in the later law. Laws 1870, Ch. 92, pp. 195, 197.

<sup>3</sup> Section 1, Article 12, of the Constitution.

<sup>4</sup> *Ungent v. The Supervisors*, 19 R. Co., 20 Ind. 80.



## SECTION SEVENTEEN.

**Chicago, K. & W. R. Co. v. Putnam et al., 36 Kan. 121; 12 Pacific 593.**

**Consolidation entitled to bonds voted to constituent.**

The defendant county subscribed for seventy-two bonds, of \$1,000 each, of the capital stock of the Arkansas River & Western Railroad Company, which thereafter was merged by consolidation in the plaintiff, the Chicago, Kansas & Western Railroad Company, a consolidation of several constituent companies. The consolidated company is held entitled to the bonds.<sup>1</sup> There seems to have been only one point raised against this view, and that was that there had been no legal consolidation. There does not seem to have been any question made in this case, as in others, that the consolidated company is not entitled to the subscriptions of the original company. The case cited,<sup>2</sup> to show that consolidation is a good defense to a county when asked to issue bonds in payment of its subscription to one of the old companies, is held inapplicable; for the statute at that time expressly reserved to each stockholder of the original companies the right to determine whether he would become a stockholder in the new corporation. The question whether this same right would not also exist without statute, was evidently not made nor argued. The objections to the validity of the consolidation are said to be unnecessary to consider, because the plaintiff is a *de facto* corporation, and its existence as such can be attacked only in a direct proceeding brought for that purpose. It will not be inquired into collaterally.<sup>3</sup>

<sup>1</sup> The court cites *Railroad Co. v. bus of the principal case in 12 Pacific Commissioners of Phillips Co., 25 593*, cites, upon the proposition that Kan. 261, upon the proposition that the validity of the organization of a consolidation of one company with corporation can be questioned only another since the act of 1870 will not by the state, the following authorities: Stout v. Zulick (N. J.), 7 Atlantic Rep. 362; North v. State (Ill.), 8 N. E. R. 159; Broadwell v. Merritt (Mo.),

<sup>2</sup> State v. Commissioners Nemaha Co., 10 Kan. 569.

<sup>3</sup> Reisner v. Strong, 24 Kan. 410; 1 S. W. R. 855; Broadwell v. Weller, Railroad Co. v. Wilson, 33 Kan. 222; Id. 857; Broadwell v. Jenkins, Id.; S. C., 6 Pac. R. 281; Pacific Railroad Broadwell v. Alexander, Id. 858; Removal Cases, 115 U. S. 1-15; S. C., Broadwell v. Terry, Id. 5 S. C. R. 1113. A note to the syllabus-

## SECTION EIGHTEEN.

**Illinois Grand Trunk R. R. Co. v. Cook, Adm'r, 29 Ill. 237.**

**Subscriber released though consolidation was under pre-existing statute.**

This case is somewhat at variance with the weight of authority, though the exact point does not seem to have been discussed, nor even raised. The railway corporation was organized under the act of 1849; consolidation was permitted by the act of 1854; complainant subscribed in 1857; consolidation was effected in 1859, and it is held that complainant is entitled to a decree enjoining the foreclosure of his mortgage securing his subscription.

The court states that the bill alleges and the demurrer confesses that the consolidation wholly changed "the character of the enterprise," and that no court has ever held that so radical a change, making a different corporation and for the attainment of a different purpose, did not release the subscriber.

The distinction which is clearly laid down in the well considered authorities between a consolidation effected under a statute existing when the subscription is made, and one effected under a statute enacted after the subscription has been made, is not even alluded to.

It is shown on other pages of this book that the authorities hold that in the former case the subscriber is presumed to have subscribed subject to the legal contingency of a consolidation being made, and must abide thereby in case it is made.<sup>1</sup>

The later Illinois case of *Illinois Midland Ry. Co. v. Town of Barnett*, 85 Illinois 313, without overruling or in any man-

<sup>1</sup> Prior cases cited in behalf of the to; *The Terre Haute & Alton R. R. railroad company: Rice v. Rock Co. v. Earp*, 21 Ill. 290, subscriber not released by subsequent change of charter by which corporation is allowed to buy stock in another, even though it causes a change in the terminus; *Banet v. Alton & Sangamon R. R. Co.*, 18 Ill. 504, subscriber not released by an immaterial change in route adopted under subsequent legislation. *Island & Alton R. R. Co.*, 21 Ill. 93, subscriber is not released by subsequent extension of road made under legislation enacted after he had subscribed; *Sprague v. The Illinois River R. R. Co.*, 19 Ill. 173, allows consolidation under an amendment to charter enacted after the subscription had been made; the general route is, however, shown to be essentially adhered

ner referring to the case last cited, holds that a subsequent consolidation under a statute existing at the time of the making of the subscription, does not avoid the same. Nothing is said as to whether the route and corporate purposes are thereby radically changed; but we must infer that necessarily they would be; it is evident that a consolidation of two or more constituents must have an aggregate route different from, and be a larger enterprise than, any of the constituents.

### SECTION NINETEEN.

**Miller v. Lancaster, 5 Caldwell (Tenn.), 514.**

**Consolidation entitled to indemnity bond given to original company.**

Bill by Martha G. Miller and the Mississippi Central Railroad Company against Samuel Lancaster and others, to collect the amount of a judgment. Bill dismissed on demurrer. Reversed.

The bond was made to the Mississippi Central & Tennessee Railroad Company, to indemnify it against all damages arising from locating its depot in the west end of the town of Jackson. A party recovered judgment against said company on account of appropriating his land, and assigned the same to the plaintiff, Miller.

The bill recites that the said company, obligee in the bond, united with the Mississippi Central Railroad Company, as authorized by statute,<sup>1</sup> and with the latter formed and became one body corporate, under the name of Mississippi Central Railroad Company; the law conferred upon the union company all the powers, rights and privileges of the original company. Object of the bill is to compel the obligors of the bond to pay the amount of said judgment.

The Mississippi Central Railroad Company stands in the stead of the original Mississippi Central & Tennessee Railroad Company. The enactment of the consolidation charter had the effect of transferring all the latter's rights under the bond to the new company.<sup>2</sup> A transfer of property between parties may well be

<sup>1</sup> Act of November 30, 1853.      *phia, etc., Co. v. Howard*, 13 How.

<sup>2</sup> 2 Redf. Rail. 659, Sec. 3, Ch. 38; (U. S. Rep.) 307; *Eaton, etc., Co. v. 6 Eng. Railway Cases*, 177; 3 Exchq. Hunt, 20 Ind. 427. R. 320; 24 Eng. L. & E. 495; *Philadel-*

worked by legislative enactment, accepted, sanctioned and given effect to by the parties. The new company thereby also became liable to pay the judgment. The like remedies lie by and against the new company, as would have lain against the old, had consolidation not taken place. This doctrine may be startling to the common law lawyer, whose modes of thought in regard to pleading and practice are one or two centuries old. But it seems proper to mould and shape the modes of proceeding to enforce rights, to the novel and changing modes of business and relations of parties, that are constantly arising out of the growth and progress of commerce, art, science and civilization generally.

The court then holds that the remedy is in equity, and not at law,<sup>1</sup> and that the judgment creditor, or his assignee (the plaintiff with the new company), has his standing in equity on the principle of subrogation.<sup>2</sup>

#### SECTION TWENTY.

**Mayor, etc., v. President, etc., of Steamboat Co., R. M. Charlton's (Ga.) Reports 342.**

**City is successor to town and may maintain ejectment for its lands.**

Ejectment by the city of Savannah against a steamboat company, to recover possession of some real estate. Sustained.

The tracts are found to have been vested in the town of Savannah, incorporated by an act of 1787. By the act of 1789, the town is named and styled the city of Savannah, and various provisions are made concerning its corporate organization and powers. Upon the reorganization of a corporate body, if it be essentially changed, there must be, in order to a transfer of particular powers, "an enabling clause empowering the body to act in a particular case, or some general clause which might embrace the particular case."<sup>3</sup> The act of 1789 professes to be amendatory of the act of 1787, and empowers the mayor and aldermen of the city of Savannah to carry into the execution the powers intended by the act of

<sup>1</sup> *Ranlaugh v. Hayes*, 1 *Vernon* and notes; *Aldrich v. Cooper*, 2 *Eq. Rep.* 189, and case 190. Lead. Cas. and notes.

<sup>2</sup> *Dearing v. Earl*, 1 *Eq. Lead. Cas.* <sup>3</sup> 8 *Peters' U. S. Rep.* 408.

1787. "This general clause is deemed sufficiently comprehensive to invest the present corporation with all the powers, rights and duties which before vested in the president and wardens."

### SECTION TWENTY-ONE.

**Farnsworth v. Western Union Tel. Co., 6 N. Y. Supp. 735.**

**Company managing several others and owning larger part of their stocks held to have made an agreement binding on them.**

The Bankers & Merchants Telegraph Company, in accordance with the terms of an agreement made with the American Rapid Telegraph Co., strung its wires upon the poles of the latter, situated in New York. Both companies subsequently passed into the hands of receivers; thereafter the latter company's receiver arranged with the Western Union Telegraph Company to cut the wires of the former company from said poles. This suit is by the receiver of the former company against the Western Union Tel. Co. for damages for such cutting. Right to recover sustained, but judgment reversed because verdict excessive.

It was, among other things, contended that the agreement for the stringing of the wires had no effect within the State of New York for the reason that it was made in Connecticut, by the Connecticut corporation. But it is held that the terms of the agreement are general, and such as to include all the poles of the American Rapid Telegraph Company. The Connecticut company is shown to have owned the larger part of the stock of the companies in the other states, and to have practically been in the management of their affairs; and the agreement itself was subscribed on behalf of the American Rapid Telegraph Company by its general manager. "It is true that this ownership of the stock of the other companies by the Connecticut company would not of itself entitle it to enter into this agreement, and make it binding upon the company incorporated under the laws of this state. The principle excluding this result was settled in *Car Company v. Railroad Company*.<sup>1</sup> But the power to enter into this contract does not stand upon

<sup>1</sup> 115 U. S. 586; 6 S. C. R. 194.

the fact that the Connecticut company had in this manner acquired the stock of the other companies, but upon the fact that the management of the affairs of the other companies appears to have been committed to the Connecticut company."

### SECTION TWENTY-TWO.

**State v. Western Irrigating Canal Co., 40 Kan. 96; 19 Pacific 349.**

**One irrigating company may buy all the property of another.**

An irrigating company may sell all of its right of way and property and franchises to another company; the latter can not be deprived of such purchased property by proceedings in quo warranto; the franchise of being a corporation, belonging to the vendor, was recalled by the state and was not transferred; the deed conveyed nothing in this respect and can not be complained of. The other franchises and the property may have been sold to meet debts or to avoid sacrifice;<sup>1</sup> no creditor or stockholder complains.

### SECTION TWENTY-THREE.

**Wood v. Bedford & Bridgeport R. R. Co., 8 Phila. Reports 94.**

**Lessee does not acquire the franchise of building the road.**

Motion to dissolve special injunction restraining defendant from leasing its road. Motion refused. Supreme court at *nisi prius*.

SHARSWOOD, J. A corporation, unless restricted, has general power to dispose of its property; but unless specially authorized has no power to dispose of its franchise.<sup>2</sup> Statute allows

<sup>1</sup> Ditch Co. v. Zellerbach, 87 Cal. 543; Manufacturing Co. v. Bank, 119 U. S. 191; 7 S. C. R. 187; Town v. Bank, 2 Doug. (Mich.) 530; Manufactory v. Langdon, 24 Pick. 49. chise can not be transferred without authority, it is held that the power to consolidate may raise an inference that the right to assign the franchise was intended to be included. Union

<sup>2</sup> Angell & Ames on Corp., § 191 and notes; 1 Redf. Railways, 588, Chap. xxii, 592; Gratz v. Pennsylvania R. Co., 5 Wright 447. Pacific Ry. Co. v. United States, 8 C. C. A. 282, 299, reversing 50 Fed. Rep. 28. General discussion and authorities

Though recognizing that a franchise can not be sold, see

the leasing of a railroad, and to run, use and operate such road; this implies a finished road, as does also the condition that they must be connecting lines; hence the franchise of building a road can not be transferred.

#### SECTION TWENTY-FOUR.

**Gould v. Head, 38 Federal 886.**

**A "Trust" can only hold and can not sell the stock of the constituents.**

A combination known as the American Cattle Trust was formed by representatives of a number of cattle companies; all of the shares of the capital stock of these companies was placed in the hands of the trust for the purpose of having all of the companies controlled and managed by it. The plaintiff had bought from the trust some of the shares of stock which it had received from one of the companies, and by suit attempted to enforce his purchase; the trust agreement was examined and it was held that the purpose of the trust was to keep the companies together, and that if it could sell the shares of one company it might of another, and hence, of all, and thus commit *felo de se*; it was therefore held that the trust had no power to make the sale in question.

#### SECTION TWENTY-FIVE.

**Farnsworth v. Drake, 11 Indiana 101.**

**Illegal consolidation may not recover on note executed to itself, but may transfer it to constituent, which may recover thereon.**

Action upon a note made by the defendant to the Madison, Indianapolis & Peru Railroad Company, or order, and alleged to have then become the property of the Peru & Indianapolis Railroad Company and to have been by it sold and assigned

City Water Co. v. State (Texas), 32 S. W. R. 1034. but the old one under a new name. (This, if taken literally, might sub-

In V. S. & P. R. Co. v. Elmore, ject it to the original company's (La.), 15 So. 701, 705, the court de- debts. Memphis & L. R. R. v. Berry, clares the foreclosure purchaser re-or- 112 U. S. 60; 5 S. C. R. 299, 302.) ganization to be no new corporation,



to the plaintiffs, who are now the owners. Demurrer to this count sustained. Judgment for defendant. Reversed.

Plaintiff must show his title; it would have been more formal to have alleged the transfer of the note from the former company to the latter; but the averment that the note was executed to the former company, and that the latter then became the owner, is sufficient; it clearly implies a sale and delivery by the former to the latter.

The second paragraph alleges the making of the note to the Madison, Indianapolis & Peru Railroad Company; that said company was, subsequently, judicially declared to have been illegally formed and the note was awarded to the Peru company as its property, and by it, etc., indorsed to the plaintiff. This is a good count; for if the named payee be regarded as having, at least, a *de facto* existence, the transfer is sufficiently shown; and if regarded as having had not even a *de facto* existence, then it is a case of a note payable to a fictitious payee, and may be sued upon by any *bona fide* holder against the real parties who knew the payee to be fictitious.<sup>1</sup>

The third paragraph alleges that the two companies were partners; that the note in suit was given to them as such; that afterward the partnership was dissolved and that the Madison company assigned its interest in the note by delivery to the Peru company. If there was a legal partnership, this paragraph is good. If there was not, and the companies had a joint interest in the subject-matter of the note, perhaps it inured to them as joint payees, and the transfer as described in this paragraph may be good. "This point, however, we do not decide."

#### SECTION TWENTY-SIX.

**Mansfield, Coldwater & Lake Michigan R. R. Co. v. Drinker, 30 Mich. 124.**

**Irregular consolidation held not entitled to recover on subscription to original corporation.**

Plaintiff, the Mansfield, Coldwater & Lake Michigan Railroad Company, claiming to be a Michigan corporation, formed

<sup>1</sup> *Minet v. Gibson*, 3 Term. Rep. 481; 1 H. Black 569; Ross on Bills and Notes, 77.

by the consolidation of a prior Michigan corporation with an Ohio corporation, brought suit to recover of defendant the amount of his subscription to the stock of the Michigan corporation. Recovery denied.

The articles of agreement in evidence as proof of the consolidation are not sufficient. They are dated December 28, 1870, and are in pursuance of the law then in force.<sup>1</sup> Election of directors was set for May 10, 1871. The law required the approval of the stockholders, and on such election being had, all the rights of the component companies were to be deemed vested in the new company.<sup>2</sup>

Before such approval was had, the law was changed and required different proceedings, which have never been complied with.<sup>3</sup> Plaintiff must rely on the former law, by which the merger was not to be complete until the agreement was filed with the secretary of state; which was not done until May 23, 1871. But the election of directors is, by the statute, a condition precedent to the new company's acquiring the rights and franchises of the respective companies; no election could take place till after May 23, 1871; none such is proved. The election prior thereto was without warrant and ineffectual.

Plaintiff's acts and construction of its road under large expenditure may, truly enough, have made it a *de facto* corporation, and as such it must be recognized so long as its powers, rights and franchises as such are not questioned by the state; and this may entitle it to enforce contracts against those who have dealt with it; but to acquire the rights of the original company in and to the subscription the plaintiff must prove an assignment, or it must show its right by succession under a consolidation. No assignment is relied on and the consolidation is not shown to have been perfected. Unless the defendant, by participation in plaintiff's actions as a stockholder therein, by virtue of his subscription to the original company, has estopped himself from disputing the consolidation, he can not be held. No such estoppel is relied upon.

<sup>1</sup> Section 50, general railroad law of 1855; Comp. Law 1857, § 1994.

<sup>2</sup> Secs. 1995, 1996.

<sup>3</sup> Sec. 2346, Comp. Laws 1871.

## SECTION TWENTY-SEVEN.

**New Jersey Midland Ry. Co. v. Strait, 35 New Jersey Law Reports 332.**

**Subscriber entitled to bonds of constituent need not take bonds of consolidation; tender of latter is not sufficient.**

Suit to recover amount of money subscribed by defendant to a railroad company, payable upon delivery to him of the company's bonds. After the making of said subscription the said company was consolidated, under legislative authority, with two others, resulting in the formation of the consolidated company, which tendered its own bonds to the defendant, and which is the plaintiff to the suit. Recovery denied.

Defendant's contract was that he should receive the bonds of the original company. Not even the legislature can require him to accept, in lieu of the promised consideration, the obligation of any other company, no matter how much the latter may exceed the value of the former. There is no legal mode in which the contract of a man can be improved for him against his consent. The original company has put it out of its power to deliver the promised bonds, and hence has discharged the defendant. It is not reasonable to say that the original company is still in existence, with merely its name and manner of organization changed. "The consolidated companies, in the nature of things, can not be the same as any one of their constituents. Such a company has larger purposes, wider powers, and heavier responsibilities than those inherent in either of its component parts." An act of the legislature will not, against the dissent of any stockholder, legalize the extension of a railroad beyond the bounds designated in its charter.<sup>1</sup> The defendant's contract and conditions on which he entered into it have been changed in every material circumstance; the length of the road, country to be traversed, amount of outlay, are all different; the bond of a road which intends building ten miles is certainly different from one which intends building one hundred miles.

The separate existence of the original company should have been preserved, in order that it could deliver the bonds agreed on. This has not been done, and there is no ability to per-

<sup>1</sup> *Zabriskie v. Hackensack, etc., R. R. Co.*, 3 C. E. Green, 178.

form the contract on the part of the company. This of necessity avoids the agreement.<sup>1</sup>

Plaintiff's case is also defective in not making sufficient proof of calls made on the defendant.

### SECTION TWENTY-EIGHT.

**The Peninsular Ry. Co. v. Tharp, 28 Mich. 506.**

**Consolidation not entitled to collect from subscriber; assessment premature.**

Defendant subscribed to the stock of the Peninsular Railway Extension Company, which thereafter was consolidated with another and thus formed the plaintiff company—The Peninsular Railway Company. Defendant held not liable.

The consolidation papers were made and dated February 13, 1868, the assessment sued on was made February 14, 1868, and the consolidation papers were filed with the secretary of state February 16, 1868. An assessment by an original corporation can not be made till after the articles are filed.<sup>2</sup> Upon a consolidation, the merger takes place upon the filing of the papers in the office of the secretary of state.<sup>3</sup> Any corporate action until this step is taken is premature. "The new corporation, deriving its franchises from the state law, can not act until the state has the requisite evidence of its claim to corporate existence. The statute is the only source of such existence and its conditions are imperative." The assessments were therefore void, and no action can be maintained upon them.

### SECTION TWENTY-NINE.

**Toledo, C. & St. L. R. Co. v. Hinsdale, 45 Ohio 556; 15 N. E. R. 665.**

**Purchasing company held not entitled to collect conditional subscription.**

Subscriptions were made to the capital stock of the Toledo & Grand Rapids Railroad Company, payable on the order of

<sup>1</sup> *Keys v. Harwood*, 2 C. B. 905    <sup>2</sup> *Comp. L.*, § 2298.  
*Planche v. Colburn*, 8 Bing. 14;    <sup>3</sup> *Comp. L.*, § 2347.  
*Frost v. Clarkson*, 7 Cow. 24; *Newcomb v. Brackett*, 16 Mass. 161.

the directors in installments. To be paid when the road is completed. The road subsequently deeded all its road bed and other property to the Toledo, Delphos & Burlington Railroad Company, which road thereafter was consolidated with the Toledo, Cincinnati & St. Louis Railroad Company. The last road brought suit against a subscriber, for the amount of his subscription to the original company, but recovery was denied. The subscriber has merely made an offer to become a stockholder upon the happening of the condition, "when the road is completed." Hence he does not, until then, become a stockholder<sup>1</sup> nor liable for the amount of his subscription; nor does he owe any debt which can be the subject of sale. The corporation by selling all its property, has put it out of its own power to ever complete the road or to perform the condition. Its subscriptions are expressly embraced in the terms of the deed whereby it sold its property, but in the statutes authorizing the purchase of railroads and the sale of road beds, right of way and other railroad property, there is no authority conferred upon one company to sell and transfer to another company its conditional stock subscription. It has only the powers which have been conferred on it.<sup>2</sup> Sections 3300 and 3409 of the statutes allowing the sale of railroads, refer either to completed roads, which would not be this case, or else to unfinished road, which the owner is unable to complete, and may then sell, with all work done, all material furnished, and with all rights, privileges and easements, and shall to the same extent vest the title of and the right to enjoy the same in such grantee; then follow provisions for executing conveyances and obtaining the stockholders' ratification; all these provisions fail to include, or indicate that there was meant to be included, the conditional subscriptions. The property authorized to be sold is evidently that which is to be used "for the construction of a railroad thereon." Only the stockholders are to be consulted; evidently the conditional subscribers were not considered interested.

The statute does not empower the one company to sell the conditional subscriptions nor the other to perform the con-

<sup>1</sup> Morawetz, Priv. Corp., § 78.

<sup>2</sup> Thomas v. Railroad Co., 101 U. S. 71, 82.

ditions and thus fix the liability upon the subscriber. It has been held under the statute of consolidation that the consolidated company can enforce the subscriptions made to the constituent companies;<sup>1</sup> but there is a difference between purchase and consolidation; in the latter, the consolidated company becomes liable for the debts of the constituent companies, and must provide for their stockholders.

### SECTION THIRTY.

**Brown v. Dibble, 65 Mich. 520; 82 N. W. 656.**

**Foreign consolidation not entitled to subscription to original company; no proof of foreign laws.**

Defendant made a subscription to the Toledo & Milwaukee Railway Co. payable on certain conditions; the company was thereafter consolidated with a company alleged to have been organized in Ohio called the Toledo & Michigan Railway Company; the plaintiff obtained the subscription as assignee of the consolidated company; held, that he can not enforce it against the defendant; the consolidated company has not been shown to be the legally created successor of the original company to which the subscription had been made. There is nothing in the record to show what the law of Ohio is concerning the organization or consolidation of railroad companies; there is nothing showing the legality of the Ohio company's incorporation or consolidation; these matters can not be presumed; they must be proved. Neither is there sufficient proof as to publication, etc., to comply with the Michigan statutes<sup>2</sup> on consolidation; nor proof that the state board had acted thereon as provided by law.<sup>3</sup> Moreover, the conditions as to the building of the road and time of its completion have not been complied with.

<sup>1</sup> Railroad Company v. Stout, 26 Ohio State 241.

<sup>2</sup> Section 80, Art. 2 of the railroad act.

<sup>3</sup> Article 2, § 3 of the railroad act.

## SECTION THIRTY-ONE.

**Mayor et al. v. Norwich & Worcester R. R. Co., 109 Mass. 103.**

**Lessees not entitled to notice of hearing for change in depot location.**

Petition<sup>1</sup> by the mayor and aldermen of Worcester and several railroads for the appointment of commissioners to determine the location in said city of a union passenger station. Report of the commissioners was objected to upon several grounds, among which was one to the effect that certain companies, not specified in the act, but interested in the roads, had not been notified of the application. The court holds notice to them unnecessary. Such parties were the lessees of one of the original corporations, the trustees under a mortgage, and the assignees in bankruptcy of said lessee of one of the original corporations which had been named in the said act; they all derived their interests from the original corporations, to whom the power to exercise eminent domain had been granted, and hold these rights under legislative authority. Yet none of these leases or assignments can be construed to extend to the lessees or assignees the power to exercise the right of eminent domain, or to restrict the right of the legislature to alter or repeal the charters. Hence, the legislature could exercise its reserved right of amending the original charters by requiring the companies to extend or change their tracks so as to come to the new location, and could provide for having commissioners act without notice to said lessees, assignees and trustees. In fact, the act itself could have established the union depot without any commissioners being provided for at all.

## SECTION THIRTY-TWO.

**Farmers' Loan & Trust Co. v. Chicago, P. & S. Ry. Co., 39 Federal 143.**

**Facts show that successor company built road for itself and not for prior company.**

The Chicago, Portage & Superior Railway Company having obtained certain land grants, mortgaged its entire property to

<sup>1</sup> Under Statute of 1871, C. 843.



the Farmers' Loan & Trust Co. Said grants were made upon a certain condition as to building the road. Subsequently, said condition not having been complied with, the same lands were granted to the Chicago, St. Paul, Minneapolis & Omaha Railway Company. The contest is between the latter company and the former, and its said mortgagee as to the title to these lands. Decision is favorable to the latter company. Among other questions discussed is the following: that the Omaha company became the owner of every share of stock of the Portage company, and of a large part of its bonded and floating debt, so as to become its principal creditor, and built a road a few yards from and parallel to the half graded line of the Portage company, which line the Portage company was to build according to the condition of the grant; and as the law avoids forfeitures where practicable, that said condition may be regarded as having been performed within the rule that "any one who is interested in a condition may perform it, and when performed it is gone forever."<sup>1</sup> The court is of the opinion that what was done by the Omaha company was not by it done as stockholder and creditor of the Portage company, but in its own right and interest; it proceeded under its own charter, representing its own stockholders, and built its own branch, and did not complete the road commenced by the Portage company. And plaintiff must have so understood it, for the bill recites that the Omaha company constructed its branch alongside of the partially constructed line of the Portage company and has ever since operated the same. So also the grant to the Omaha company is on the condition<sup>2</sup> that the said company would continuously proceed with the road in part constructed by it. Moreover the whole case is on the theory that the Omaha company had sought to prevent any result which would have been favorable to the Portage company, hence it would be inconsistent to say that it was interested in performing, or intended to perform or was by the state regarded as performing, the condition in question for or on behalf of the Portage company.

<sup>1</sup> 2 Crabb, Real Property, 815; 2 Wash. Real Prop., 2d Ed., 12.    <sup>2</sup> Sec. 2, Act of February 16, 1882.

## SECTION THIRTY-THREE.

## Sundry instances.

Consolidated company obtains the constituent's exclusive privilege to supply gas. *New Orleans Gas Co. v. La. Light, etc., Co.*, 115 U. S. 600; 6 S. C. R. 252, reversing 4 Woods 90.

And for its employes it obtains the former company's privilege, exempting them from working on the highways. *Zimmer v. State*, 30 Ark. 677.

Obtains the constituent's right of eminent domain and this includes the right to keep up and maintain, as well as to originally construct. *South Carolina R. Co. v. Blake*, 9 Rich. 228.

It undoubtedly obtains power of condemnation when it is an incorporation of the same state with constituent. *Toledo, etc., Ry. Co. v. Dunlap*, 47 Mich. 456.

The interest of a lessor constituent vests in the consolidation. *New York, etc., Ry. Co. v. Saratoga, etc., R. Co.*, 39 Barb. 289.

The intent being to confer all privileges on a purchasing company, it obtains the property not merely to operate it under its own charter, but obtains also the existing limited liability as to killing stock. *Daniels v. St. Louis, etc., R. Co.*, 62 Mo. 43.

A statute allowing a company to "contract" for the use of a road enables it to take same upon a perpetual lease, although statute also prohibits merger or consolidation. *Gere v. N. Y., etc., R. Co.*, 19 Abb. N. C. 202.

Authority to consolidate is not an authority to lease. *Mills v. Central R. Co.*, 41 N. J. Eq. 1.

Right of way obtained on condemnation is not limited to the period of the charter of the original corporation; it passes to the successor, and having been taken for railroad use it remains for such during the extended period of the successor's charter. *Davis v. Memphis & C. R. Co.*, 87 Ala. 633, 6 So. 140. Same rule applied to act of legislature conferring water privileges on parties who bought water privileges on judicial sale, although such statute thus deprives the original land owners of their right of reverter upon first company's non-user. *Bass v. R. N. & W. P. Co.*, — N. C. —; 16 S. E. 402.

A conveyance of "all and singular the chartered rights, privileges and franchises of every kind," is held not to include land

grants not connected with the operation of the road. *Shirley v. Waco Tap. R. Co.*, — Texas —; 10 S. W. 543.

A gravel road was sold on execution; the purchasers organized as a corporation; held, on quo warranto, that they have a right to operate the road. *State v. Hare*, 121 Ind. 308; 23 N. E. 145.

The employes of a Tennessee corporation being exempt from road work, the same corporation is incorporated in Alabama with the same privileges; the employes are held exempt in Alabama. The court declines to consider, because not put in evidence, a Tennessee case, which is said to declare the exemption unconstitutional. *Johnson v. State*, 88 Ala. 176; 7 So. 253.

The constitutional provision against issuing fictitious stocks or bonds is not violated by issuing \$2,600,000 in payment for property admitted to be worth only one half that much. The provision is aimed at stock issued fraudulently and to deceive the public; whereas in this case the purchasers at the foreclosure, though buying the property at the lower figure, had a right to sell it at their own price, namely, the higher figure. *Memphis & L. R. R. Co. v. Dow*, 7 S. C. R. 482.

Under the statute prohibiting the consolidation from issuing more stock than the "fair aggregate value of the property, franchises," etc., of the constituents, the new stock is limited to the net value of the property, etc., of the component corporations in excess of their liabilities. A stockholder may obtain injunction against issue of excess. *Langan v. Francklyn*, 20 N. Y. Supp. 404.

Unauthorized transfer of franchise held cured by subsequent legislative recognition. *Hatcher v. Toledo, etc., R. R. Co.*, 62 Ill. 477.

The assignment of a charter is inoperative to convey the franchise, especially when, as in this case, the assignment itself is found to have been unauthorized and fraudulent. *Welch v. Old Dominion M. & R. Co.*, 10 N. Y. Supp. 174.

A foreign corporation does not, by deed from a domestic one, acquire latter's power of eminent domain, unless there is legislative consent, which consent may, however, be inferred from a series of acts, or from recognition or ratification, and need not be so expressly proven as an original grant of corporate power. *Abbott v. R. R. Co.*, 145 Mass. 450, 453.

## CHAPTER XVII.

## CORPORATION HOLDING STOCK IN ANOTHER.

A stockholder can object to the funds of the corporation being diverted from the corporate purpose and used for purchasing stock in another corporation; nor can such purchase be made as an incident to the power granted to buy such property as may be needed for completing the corporate enterprise; corporate funds can not be used for any new and distinct undertaking involving new risks to the stockholders and not fairly within the terms of the original grant.

Public policy also requires that corporations be restricted in their power of accumulating property, and that they do not restrict competition; forfeiture may be incurred if the corporations violate these principles; hence the stockholder has a standing in court to prevent their so doing.

It seems that one corporation may hold of the stock of another where the holding is quite incidental and altogether appropriate to and in keeping with the main object of the corporation; as for instance that an insurance company, which must keep a reserve fund on hand, may invest the same in stocks of other corporations.

Even when the stock is thus held, the holder can not, if its interests conflict with those of the other corporation, vote such stock to the detriment of such other corporation.

Competition should be left untrammelled, and should not be exposed to the danger of restriction by means of the purchase by the one corporation of the stock in a competing one. The interests of the people will be protected by injunction at the suit of the attorney-general; nor will this be tolerated by indirection, as where a non-competing road buys such stock, but for the benefit of a competing one.

These principles do not, however, apply to purely private corporations, owing no duties to the public; they may hold stock in other corporations, certainly when appropriate as an investment, or taken for debt, or from some other sufficient reason. The public can not complain, nor can the stockholder,

unless, perhaps, upon the ground that it is a diversion of the funds from the corporate purposes.

Even corporations of a *quasi* public nature may hold stock in each other when it is but a means to an ultimate legitimate conclusion, as for instance, an authorized consolidation.

### SECTION ONE.

#### **Central Railroad and Banking Co. v. Collins, 40 Ga. 582.**

**Company restrained at suit of its own stockholders from obtaining control of another.**

Bill by stockholders in the Central Railroad and Banking Company, stockholders in the Southwestern Railroad Company and sundry citizens of Georgia, charging that said companies are about to buy from the city of Savannah 12,383 shares of the stock of the Atlantic & Gulf Railroad Company (a competing line), with the intent and purpose to use the stock thus purchased to affect the management of the Atlantic & Gulf road. Injunction granted below, sustained above. Opinion by McCay, J.; concurring opinion by Brown, C. J.; dissenting opinion by Warner, J., substantially as follows:

McCAY, J. The citizens, simply as such, have no standing in court; it is a mere private suit to enjoin the making of a contract; only those having a pecuniary interest can complain; the wrong done the public can not be reached in this decree; the stockholders are proper parties.

The profitableness of the contract has nothing to do with the matter; any one stockholder has the right to object; the charters do not give the companies the right to go into the contract; each stockholder can stand upon his rights as secured by the charter; he is not to be forced into an enterprise not included in the charter; the company's funds can not, without his consent, be used for any purpose not included in the charter.<sup>1</sup>

Powers declared in the charters do not include the right to

<sup>1</sup> 1 Shelford on Railways, 71; 1 My. 318; 43 N. Hamp. 525; 6 Angell & K. 162-8; 4 Y. & Coll. 618; 2 Dan. Ames on Corp., 4th Ed., and cases P. C. 521; 5 Hill 386; 18 Barbour cited.

buy any other real or personal property than such as may be needed for building the roads described in the charters. Charters are to be strictly construed.<sup>1</sup> It is not a valid reason for the contemplated purchase, to plead that the Atlantic & Gulf Railroad is so competing with the defendant roads and so reducing rates, that they are compelled, from a duty of self-preservation, to make the purchase.

The power granted to maintain the road does not include the power to take part in the management of the Atlantic & Gulf Railroad; "maintaining" has reference to keeping it in repair, and not to extending its business or lessening its rivalries by schemes and enterprises not contemplated and expressed in clear, unambiguous terms, by the charter itself.

The stockholder must abide by the decision of the majority, but can insist that the acts which they direct shall be within the objects and purposes of the charter;<sup>2</sup> neither the state nor the stockholders have consented that any rights should be exercised other than those which are clearly and expressly set down in the charter;<sup>3</sup> a corporation can undertake no enterprise not expressly mentioned in its charter.<sup>4</sup>

The power to do acts necessary to enable a corporation to answer the ends of its creation, like the express grant of power, is also to be strictly construed; and even for this purpose it can not engage in any new and distinct enterprise, involving new risks to its stockholders and not fairly within the terms of the original grant.<sup>5</sup> If the defendant can buy the stock in question it could buy all of it, and thus, though chartered to run one road, it would really be managing and maintaining two. Its

<sup>1</sup> Revised Code, § 2331; *Charles Ry. Cases*, 573; *Solomons v. Lang, River Bridge v. Warren Bridge*, 14th jurist, December, 1840; *Merritt* 11 Peters 543; *Stansbridge Canal v. v. Shrewsbury & Chester Ry.*, 3 Eng. L. & E. R. 149; 16th Eng. L. & Eq.

<sup>2</sup> *Young v. Harris*, 6 Ga. R. 130.

<sup>3</sup> 13 Penn. 133; 28 Penn. 352; 18 How. 341.

<sup>4</sup> *Frederick v. City of Augusta*, 5 Ga. 561; *Mayor, etc., v. Macon & W.R. R. Co.*, 7 Ga. 221; 8 Ga. 23; 9 Ga. 213; *Winter v. Mus. R. R.*, 11 Ga. 438; *East Anglian, etc., v. Eastern, etc., Co.*, 7 Eng. L. and Eq. 505; *Wood v. Greenville, etc., Co.*, 3 Jones' Eq. (N. C.) 183; *Coleman v. Eastern, etc., Ry.*, 6 Eng.

R. 180; *E. A. R. R. Co. v. The Eastern n Co. Ry. Co.*, 21 L. Rep. (N. S.); 10 Beavan 1; 6 *Railway Cases* 152; 43 N. H. 5115.

<sup>5</sup> 18 How. 341, 485; 2 *Russ. & My.* 480, 470; 4 *Railway Cases*, 492; 7 *Hare Chan. R.* 114; 4 *My. & Craty*, 134; 1 *Edwards*, 84; 22 *N. Y.* 274; 18 *Eng. L. & Eq.* 513; 4 *Russ.* 562; 1 *Black. U. S.* 149.

stockholders, by their subscriptions, did not bind themselves to any such indefinite and unlimited enterprise.

The stockholder has also a standing in court, though a citizen, merely as such, has none, to insist that the corporate property shall not be used in violation of the public policy of the state; he may protect it against the danger of forfeiture. Public policy requires that corporations be restricted in their power of accumulating property; large accumulations remaining intact for a long period of time are dangerous to the public weal. "Freed, as such bodies are, from the sure bound to the schemes of individuals—the grave—they are able to add field to field, and power to power, until they become entirely too strong for that society which is made up of those whose plans are limited by a single life."

Competition begets energy, economy, skill and enterprise, that have had much to do with the remarkable progress which has been made.

The sole purpose which prompts the contemplated purchase is to prevent the ruinous competition which the Gulf Road has entered into. Even a petty tradesman can not legally bind another not to carry on a particular business over any large extent of territory; and here is a contract, the "object of which is unblushingly avowed to be" to get control of the Atlantic & Gulf Road, so that it shall cease to carry freight at low rates, and thus thwart the very object of the legislature in granting the charter and becoming itself a large stockholder.

It is contended that the bill comes too late; the contract was consummated before the bill was filed. The city of Savannah, the seller of the stock, is not bound to take notice of the company's want of power to make the purchase. But the facts show that the city had notice thereof. Moreover, the contract is illegal on the grounds of public policy, and hence notice is not necessary, as in such case, by settled rule, no person is innocent, as everybody is presumed to know the law.<sup>1</sup>

BROWN, C. J., concurring, finds that the city had actual notice of the provisions of the charter. A railroad company, without express authority given by the legislature, can not purchase stock in another railroad company.<sup>2</sup> A corporation can

<sup>1</sup> Code, Section 7.

field, vol. 1, page 148, note; 12 Bevan

<sup>2</sup> Angell & Ames on Corp. 392; Red- 339.



not apply its funds to objects other than those distinctly defined by its charter, or by act of the legislature, no matter how beneficial the misapplication might be to the company or to the individual stockholders.<sup>1</sup>

It is contended that the defendant has the power by act of 1852, to lease roads running in connection with it, and hence the state has expressed itself as willing that the defendant company should control the other. But the Atlantic & Gulf road does not run in connection with it; on the contrary, it runs in opposition to it. If connection means whenever a track is laid between two roads, then all roads would be in connection with each other.

Public policy is violated by the contemplated purchase, and destruction of competition. The stockholder may call the corporation to account in equity for any act done in violation of its charter.<sup>2</sup> An injunction will be granted to restrain the violation of a charter, whether it be by a misapplication of funds or the exercise of ungranted power.<sup>3</sup>

WARNER, J., dissenting: Citizens, merely as such, have no standing in court. The stockholders can be heard only when injured; no injury is shown to be occasioned to them. Even if (as held by the majority) the act of 1861, allowing the defendants to lease the Gulf road, is void, as having been passed in aid of the rebellion,<sup>4</sup> yet it shows, as does also the act of 1852 allowing the leasing of connected roads, that the policy of the state is not averse to having the Gulf road come under the control of the defendant. The plenary power granted to the Central Railroad & Banking Company to purchase goods, chattels and effects of whatsoever kind, nature or quality the same may be, includes the power to purchase the stock in question.<sup>5</sup>

<sup>1</sup> 8 Eng. Y. & E. R. 150, 16 Id. 182; 73 Eng. Com. L. 73; Woodbury & Minot 106; 24 Conn. 162; 21 Howard, 442.      tion against corporation from obtaining a parallel line, see L. & N. R. Co. v. Commonwealth (Ky.), 31 S. W. 476 and cases cited.

<sup>2</sup> 2 Russel & Mylne, 461; 13 Eng. Com. Ch. Reports, 131; 2 R. & M. 470; 4 John. Ch. 573; 1 Eng. Ry. Cases, 153, 154.      <sup>4</sup> Article 11, Constitution of 1868.

<sup>3</sup> Redfield's Ry. Cases, 92, and notes; Ibid., 474, 475 and notes; 1 L. Reg. 154; Eden on Injunctions, 838-839.      <sup>5</sup> Brief for plaintiffs in error: Corporations may purchase unless restrained by their charters. Angell & Ames on Corporations, § 155, *et seq.*; Grant on Cor., 107; 3 Rand. R. 141. The contract "must be wholly aside from general object of the incorpora-

That the state may obtain injunc-

## SECTION TWO.

**People ex rel. Peabody v. Chicago Gas Trust Co., 130 Ill. 268.**

**Distinction between legitimate holdings for investment and illegal holding for purpose of creating a monopoly.**

This was quo warranto against the defendant, a corporation organized for the purpose of obtaining and holding all of the capital stock of four existing gas companies. The circuit court deemed this plan of organization legal and valid; the supreme court reverses the cause and holds the corporation to be illegally constituted. Following is the opinion in full so far as applicable to the general propositions involved:

There are two views, which may be taken of the power to purchase and hold the capital stock of other gas companies as designated in said second clause. Must it be regarded as an original, independent power intended to exist exclusively of and in addition to the power named in the first clause, or may

tion." Redf. on R. R. 490; 35 Eng. M. 178; 8 Wheat. 355; 1 Rich. L. R. L. & E. R. 9; 30 Id. 120 *et seq.*; and (S. C.) 288; 4 John. Ch. R. 370; 16 S. & R. 144; 14 Geo. R. 327; 6 Id. 156; 18 S. & M. 411. If this bill is for rival companies it is bad. 19 E. L. & E. 14.

Chitty on Corp. 663. *Ultra vires* not necessarily void, 22 N. Y. R. 258; Contract may stand though directors liable, 35 Eng. L. & E. 9; 30 Id. 120. The state only can complain, A. & A. on Corp., Sec. 777; 3 Rand. R. 136 *et seq.*; as to freights and tolls see 93 E. C. L. 63; 94 Id. 365. Sufficient that one of the defendant companies had power to purchase even if the other had not. 5 John. R. 162; 1 Peck. R. 500; 8 Cowen R. 168; Story on Prom. Notes, Secs. 99, 425 and note, 428; 1 Parsons Con. 25, 26; 13 Mass. R. 151; the trade is good so far as the city is concerned. 7 Serg. & R. 813; 14 Peters R. 122; 1 Doug. (Mich.) 401; 3 Rand. R. 140. Charter may be forfeited if abused but contract is good. 16 Mass. R. 101-2; 9 Ib. 423; 8 S. &

Brief for defendants in error: Corporations can do nothing not allowed by their charters. 2 Kent 298; 2 Cranch 167; 4 Wheat. 686; 13 Peters 587; 4 Wheat. 418; 2 Cowen 664, 709; 3 Wend. 482; 1 Kelly, 533; 5 Id. 561; 7 Id. 224; 8 Id. 23; 9 Id. 213; 11 Id. 438; 25 Id. 610. Any stockholder may complain. Grant on Corp., 301, 802; 10 Beavan 1; 2 R. & M. 483; 3 Eng. L. & Eq. 150; 16 Id. 182; 73 E. C. L. 73; Collyer 376; 2 Russ. 501. The policy of the state must be gathered from the law, and the state gave all rights which she intended defendants to exercise. Pierce on R. R. 398; 12 Beavan 352; 30 Eng. L. & E. 143; 7 Id. Eng. L. & E. 505; 16 Id. 180; 12 Id. 224; 73 E. C. L. R. 811, 814.

it be considered as merely ancillary to the other power of maintaining and operating works for the manufacture and sale of gas? If the latter view be correct, the main object for which the Gas Trust Co. was formed, would be that it might itself maintain and operate works for the manufacture and sale of gas, while the purchase of shares of stock in other companies would be merely a subordinate object, incidental only to the main purpose of the corporate formation. An illustration of this idea may be found in the general law of this state in regard to life insurance companies, which makes it lawful for a life insurance company organized in the state to "invest its funds or accumulations in the stocks of the United States \* \* \* or in such other stocks and securities as may be approved by the auditor." The main object of forming such a company is to engage in the business of life insurance, but the power to invest surplus funds in certain stocks is given as an incident to such business.

Can the power to purchase and hold the stock of other gas companies be lawfully exercised by the appellee as incidental to the main purpose of maintaining and operating works for the manufacture and sale of gas?

Corporations can only exercise such powers as may be conferred by the legislative body creating them, either in express terms, or by necessary implication; and the implied powers are presumed to exist to enable such bodies to carry out the express powers granted, and to accomplish the purposes of their creation. (C. P. & S. W. R. R. Co. v. Marseilles, 84 Ill. 643; Chicago Gas Light Co. v. People's Gas Light Co., 121 Id. 530.) An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it. (Hood v. N. Y. & N. H. R. R., 22 Conn. 1; Franklin Co. v. Lewiston Savings Institution, 68 Maine, 43.)

Where a charter, in express terms, confers upon a corporation the power to maintain and operate works for the manufacture and sale of gas, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist. There is no necessary connection between manufacturing of gas and buying stocks. If the purpose for which a gas company has been created is to make and sell gas and operate gas works, the purchase of stock in other gas

companies is not necessary to accomplish such purpose. "The right of a corporation to invest in shares of another company can not be implied because both companies are engaged in a similar kind of business." (1 Morawetz on Priv. Corp., Sec. 431.)

It is true that a gas company might take the stock of another corporation in payment of a debt, or, perhaps, as security for a debt, but the actual purchase of such stock is not directly and immediately appropriate to the execution of a specifically granted power to operate gas works and manufacture gas. Some corporations, like insurance companies, may find it necessary to keep funds on hand for the payment of losses by death or fire, or to meet other necessary demands, but it is questionable whether even these can invest their surplus funds in the stocks of other corporations without special legislative authority. But there is nothing in the nature of a gas company which renders it proper for such a company to accumulate funds for outside investments; its surplus profits belong to the stockholders, and, when distributed among them, can be used by them as they see fit.

If, then, the power to purchase outside stock can not be implied from the power to operate gas works and make and sell gas, a company, to whom the latter power has been expressly granted, can not exercise the former without legislative authority to do so. This is the law as settled by the great weight of authority.

Boone, on the Law of Corporations, says: "Without a power specifically granted or necessarily implied, a corporation can not become a stockholder in another corporation, and especially where the object is to obtain the control or affect the management of the latter." In Green's Brice's *Ultra Vires* (page 91, note b), it is said: "In the United States a corporation can not become a stockholder in another corporation unless by power specifically granted by its charter, or necessarily implied in it." So also Morawetz on Private Corporations (Secs. 431, 433), says: "A corporation has no implied right to purchase shares in another company for the purpose of controlling its management. \* \* \* A corporation can not, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation, nor can it do this indirectly through persons act-

ing as its agent or tools." The authorities referred to by these text writers sustain the conclusions announced by them. It has been held in many cases, that, "in the United States, corporations can not purchase, or hold or deal in the stocks of other corporations, unless expressly authorized to do so by law," and that one corporation can not become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute." (Franklin Co. v. Lewiston Sav. Ins., *supra*; Franklin Bank v. Commercial Bank, 36 Ohio St. 350; Milbank v. N. Y., L. E. & W. R. R. Co., 64 How. (N. Y.) 20; Sumner v. Marcy, 3 W. & M. 105; Mut. Savings Bank v. Meriden Agency, 24 Conn. 159; Central R. R. Co. v. Collins, 40 Ga. 582; Hazlehurst v. Savannah R. R. Co., 43 Id. 13; Berry v. Gates, 24 Barb. 199.)

The special charters of the Chicago Light and Coke Co. and of the People's Gas Light and Coke Co., which are set out in full in the information and not called in question in any of the pleas, confer, by express grant, the power to erect gas works and manufacture and sell gas, etc., but do not confer the power to buy shares of stock in other companies; upon the latter subject they are silent. It will not be denied, that, under the authorities already cited, these two companies can not buy and hold stock in other gas companies. The same would undoubtedly be admitted to be true of the Chicago Gas Trust Company, if it held under a special charter of like tenor and effect granted before the adoption of the constitution of 1870. Does it make any difference that the appellee was organized under the general incorporation act?

The general incorporation act of this state does not, in express terms, confer upon the corporations organized under it, power to purchase and hold shares of stock in other corporations. It is silent upon that subject. The only powers granted by it are the ordinary corporate powers, such as the rights to be bodies corporate and politic, to sue and be sued, to have a common seal, etc. The charter of a corporation formed under such a general law does not consist of the articles of association alone, but of such articles taken in connection with the law under which the organization took place. (1 Morawetz on Priv. Corp., Sec. 318.) The provisions of the law enter into and form a part of the charter. It certainly can not be true that a corporation, formed under the general incorporation act

for a purpose other than that of dealing in stocks, can exercise the power of purchasing and holding stocks in other corporations, where such power can not be necessarily implied from the nature of the power specifically granted, and it is not necessary to carry the latter into effect.

The power to purchase and hold stock in other companies must be the subject of legislative grant, if not in all cases, at least in cases where it can not be implied from the powers expressly granted. The general incorporation law contains no grant of such power by the legislature. Can a corporation organized under that law be clothed with such a power by merely naming it in the statement filed with the secretary of state? We think not. The action of the secretary of state in issuing the license and the certificate of organization is necessarily, to a large extent, merely ministerial. (Oregon Ry. Co. v. Oregonian Ry. Co., 130 U. S. 1; 4 Am. and Eng. Ency. of Law, Tit. Corporations, page 192, note 1.) Whether the articles of association, consisting of the statement, the license, the report of the commissioners, the certificate of organization, etc., do or do not confer such rights and powers as are authorized by the law, is a matter for judicial determination. Counsel for appellee says: "We do not claim, of course, that the action of the secretary of state is conclusive and not subject to review by this court," etc.

The question whether or not the power to purchase stock is a lawful purpose under section one of the incorporation act, which provides that "corporations may be formed in the manner provided by this section, *for any lawful purpose*," does not arise under this branch of the discussion. It will be pertinent when we come to consider the right to buy and hold stock as an original and independent power, or object of formation. It is not denied by the appellant that the organization of appellee, for the purpose of erecting gas works, and making and selling gas, is an organization for a lawful purpose. Viewing that as the main purpose for which appellee was formed, the incorporators could not tack on and connect with such main purpose the power to buy and hold stocks in other gas companies by merely describing such power in the statement. To hold that they could confer such power by writing it down in the statement, would be to hold that the general assembly could clothe them with a part of its legislative functions.



When a corporation is formed, under the general incorporation act, for the purpose of carrying on a lawful business, the law, and not the statement, or the license, or the certificate, must determine what powers can be exercised as incidents to such business. Even if shares of stock be regarded as personal property, as claimed by counsel for appellee, section five (5) of the general law provides that corporations formed under it "may own \* \* \* so much \* \* \* personal estate as shall be necessary for the transaction of their business, and may sell and dispose of the same when not required for the uses of the corporation, \* \* \* and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed." This language negatives the idea that a corporation formed under the general law can exercise the power of buying and holding the stock of other companies. A company engaged on its own account in manufacturing and selling gas does not need the stock of other gas companies in order to transact its business. Hence it is forbidden to own such stock, the same being "personal estate."

The language of the act, as thus quoted, expressly restricts the powers of a corporation organized under it to such powers as are necessary and requisite to carry into effect the object for which it was formed. We have already seen, that, where the object of forming a gas company is to engage in the business of making and selling gas, the purchase of stock in other companies is not necessary to carry such object into effect. Therefore, the general incorporate act not only does not expressly authorize the purchase of such stock, but impliedly forbids it in cases where the main purpose of the corporate creation is other than the purchase and sale of stocks.

It has been held that the powers obtained by corporations organized under general laws are necessarily restricted to those mentioned in the act (*Medical Coll. Case*, 3 Whart. (Pa.) 445); that in such cases the charter is void as to all powers and privileges granted beyond the provisions of the statute (*Heck v. McEven*, 12 Lea (Tenn.) 97); that, if unauthorized provisions are added to the articles of incorporation, all acts done pursuant to such provisions will be void (*Eastern Plank R. Co. v. Vaughan*, 14 N. Y. 546); that anything in such articles not warranted by the statutes, authorizing the formation of



corporate bodies, is void for want of authority (Oregon Ry. Co. v. Oregonian Ry. Co., 130 U. S. 1); and that such article must be construed strictly, and against the grantee and in favor of the government or the general public (*idem*).

Our conclusion upon this branch of the case is, that if the Chicago Gas Trust Company be regarded as a corporation formed for the purpose of erecting or operating gas works and manufacturing and selling gas, it has no power to purchase and hold or sell shares of stock in other gas companies, as an incident to such purpose of its formation, even though such power is specified in its articles of incorporation.

We come now to the second view of the right to purchase and hold the stock of other companies, which is involved in the issue presented by the demurrers to all of the eleven pleas, including the first, third and seventh.

The eight pleas other than the three last named are bad on demurrer, because they do not set out defendant's title specially. It is not enough to allege generally that the power or franchise in question was among the powers conferred by the charter; the pleas should set forth particularly and in detail the facts, which show how the corporate power or franchise was conferred upon or acquired by the defendant. (Clark v. The People ex rel., 15 Ill. 213; Carrico v. The People, 123 Id. 198.)

But if this technical objection be waived, the eight pleas are demurrable, for reasons which go to the merits. Some of them aver that the charter confers the power to purchase "*the capital stock*" of other gas companies, which, as hereafter stated, means all the capital stock of such companies. Others of them are less explicit. But all of them aver that the charter granted a power broad enough to authorize the purchase of a majority of the shares of the capital stock of other gas companies, and that, under it, such majority of shares has been purchased. All of them plead the right to so purchase a majority of said shares as an original and independent power or franchise, without reference to the other power of making and selling gas. Hence they fall within the objections hereinafter stated.

The language of the statement as set out in the first, third and fourth pleas, imports an intention to create the Chicago Gas Trust Company for two independent objects. The clauses describing these objects are connected by the conjunction

"and." Both were designed to be of equal importance and to be carried out independently of each other. According to the plain meaning of the terms in which they are set forth, neither was to be regarded as secondary or incidental. The first of these objects is stated as follows: "to build, erect, purchase, lease, establish, maintain, enlarge, extend and operate, or demise, works in \* \* \* Chicago, \* \* \* and in such other place or places in \* \* \* Illinois, as said corporation may, by the vote of the majority of its stockholders, elect, for the manufacture, supply, sale and distribution of gas and electricity, or either, for the furnishing of light, heat, fuel and power," etc. There is nothing in this record to show that appellee has ever done anything toward the accomplishment of this first object.

The second of the two objects is stated as follows: "And to purchase and hold or sell the capital stock, or purchase, or lease, or operate the property, plant, good will, rights and franchises of any gas works, or gas company or companies, or any electric company or electric companies in \* \* \* Chicago \* \* \* or elsewhere in \* \* \* Illinois, as said corporation may, by vote of the majority of the stockholders, elect," etc.

Manufacturing and selling gas is one kind of business; dealing in stocks is another and different kind of business. If it appeared that the appellee was engaged in both under its present charter, a serious question might arise as to the power to organize one corporation for two distinct purposes under the general incorporation act of this state. This record, however, only shows that the appellee is exercising the power designated by the declaration of the second object of its formation. What is the power which it is so exercising?

If appellee can "purchase and hold the capital stock" of other gas companies, it can hold all the capital stock of such companies. "The capital stock" does not mean a part, but the whole. We have already seen that "the capital stock," as those words are here used, includes all the shares of stock. This view is strengthened by the use of the words, "or purchase, or lease, or operate the property, plant, good will, rights and franchises" of any gas company. If capital stock meant nothing but property, the right to purchase property would not be mentioned in separate words. Counsel for appellee say

in their brief: "It is a pretty nice distinction to say that the power to buy capital stock of a corporation does not include the power to purchase certain shares of that stock." If power to purchase "capital stock" includes the power to purchase "certain of the shares of that stock," then power to purchase "the capital stock" includes the power to purchase all the shares of such stock.

The power sought to be conferred by these articles of association is something more than the mere right of purchasing certain shares of the stock of other gas companies as an investment; an attempt has here been made to vest the Chicago Gas Trust Company with the tremendous power of purchasing and holding all the shares of stock, and purchasing and operating all the property, rights and franchises of every gas company, not only in Chicago, but in the State of Illinois. What has been done under the power thus claimed to have been lawfully granted?

There were four gas companies in the city of Chicago whose names have already been mentioned. One of them, under an old charter of 1849, had the right to lay its mains and pipes in the streets without permission of the city. The other three had permission to do so under ordinances passed by the city council. All of them laid their pipes and mains and were engaged in making gas and furnishing it to the inhabitants. They were the only gas companies who were so engaged, and who had undertaken to make such use of the public streets. The Chicago Gas Trust Company has purchased and now holds a majority of all the shares of stock of these four companies. It was itself organized with a capital stock of \$25,000,000; the capital stock of the four companies was \$16,984,200. How great a majority of such stock is held by the appellee does not appear from the record. What results must necessarily follow from such ownership of a majority of the shares of stock of these four companies?

One result is that the Chicago Gas Trust Company can control the four other companies. The question is, whether it has attempted to exercise such control; the law looks to the general tendency of the power conferred. (Greenwood on Public Policy, page 5; *Richardson v. Crandall*, 48 N. Y. 343; *Salt Co. v. Guthrie*, 35 Ohio St. 666.) The sixth section of the general incorporation act provides that the corporate powers shall be

exercised by a board of directors or managers, and that the number of such directors or managers, and their terms of office, shall depend upon "the consent of the owners of a majority of the shares of stock." It can not be denied that appellee, as owner of the majority of the shares of stock of these four companies, can control them, in the exercise of all their corporate powers, through a board of managers of its own selection. In *Weidenger v. Spruance*, 101 Ill. 278, this court, speaking through Mr. Justice Scholfeld, said: "The stockholders elect the directors, and, through them, carry into effect the corporate functions. Presumably, the directors act in obedience to the aggregate wishes of the stockholders," etc. (*Milbank v. N. Y., L. E. & W. R. R. Co.*, 64 How. (N. Y.) Rep. 29.)

The control of the four companies by the appellee—an outside and independent corporation—suppresses competition between them, and destroys their diversity of interest and all motive for competition. There is thus built up a virtual monopoly in the manufacture and sale of gas.

The fact that the appellee, almost immediately after its organization, bought up a majority of the shares of stock of each of these companies, shows that it was not making a mere investment of surplus funds, but that it designed and intended to bring the four companies under its control, and, by crushing out competition, to monopolize the gas business in Chicago.

The general incorporation act provides, "that corporations may be formed in the manner provided by this act *for any lawful purpose* except banking, insurance, real estate, brokerage, the operation of railroads and the business of loaning money." The purpose for which a corporation is formed under the act, must be a *lawful* purpose. So far as appellee was organized with the object of purchasing and holding all the shares of the capital stock of any gas company in Chicago, or Illinois, it was not organized for a lawful purpose, and all acts done by it toward the accomplishment of such object, are illegal and void.

The word "unlawful" as applied to corporations is not used exclusively in the sense of *malum in se* or *malum prohibitum*. It is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do; or, in other words, such acts, powers and contracts as are *ultra*

*vires.* (Franklin Co. v. Lewiston Sav. Ins., *supra*; Oregon Ry. Co. v. Oregonian Ry. Co., *supra*.)

The business of manufacturing and distributing illuminating gas by means of pipes laid in the streets of a city is a business of a public character; it is the exercise of a franchise belonging to the state; the services rendered and to be rendered for such a grant, are of a public nature; companies engaged in such business owe a duty to the public; any unreasonable restraint upon the performance of such duty is prejudicial to the public interest and in contravention of public policy. (Chicago Gas Light Company v. People's Gas Light Company, 121 Ill. 530; Gibbs v. Baltimore Gas Co., 130 U. S. 396.)

Whatever tends to prevent competition between those engaged in a public employment, or business impressed with a public character, is opposed to public policy, and therefore unlawful. Whatever tends to create a monopoly is unlawful as being contrary to public policy. (2 Addison on Cont. 743; Greenhood on Public Policy, pages 180, 643, 654, 655, 670; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Craft v. McConoughy, 79 Ill. 346; Central R. R. Co. v. Collins, 40 Ga. 582; Hazelhurst v. Savannah R. R. Co., 43 Id. 13; Trans. Co. v. Pipe Line Co., 22 W. Va. 600.)

In Craft v. McConoughy, *supra*, where the opinion was delivered by Mr. Justice Craig, we said: "We understand it to be a well settled rule of law, that an agreement in general restraint of trade is contrary to public policy, illegal and void, etc. \* \* \* Whatever is injurious to the interest of the public is void on the ground of public policy." In Salt Co. v. Guthrie, *supra*, the Supreme Court of Ohio said: "Public policy unquestionably favors competition in trade to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices to the injury of the general public."

We are reminded by counsel that the application by the courts of public policy to the law, is a usurpation of legislative functions. And undoubtedly some courts have gone so far as to deserve the charge of such usurpation. But it is the duty of the judiciary to refuse to sustain that which is against the public policy of the state, when such public policy is manifested by the legislation, or fundamental law of the state. (Female Academy v. Sullivan, 116 Ill. 375.) By chapter 28

of our Revised Statutes, it is provided that "the common law of England, so far as the same is applicable and of a general nature, \* \* \* shall be the rule of decision, and shall be considered of full force until repealed by legislative authority." Public policy is that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public, or against the public good. This principle owes its existence to the very sources from which the common law is supplied. (Greenhood on Public Policy, pages 2 and 3.)

The common law will not permit individuals to oblige themselves by a contract either to do or not to do anything when the thing to be done or omitted is in any degree clearly injurious to the public. (Chappel v. Brockway, 21 Wend. 159; Transportation Co. v. Pipe Line Co., 22 W. Va. 600.) In *Stanton v. Allen*, 5 Denio 534, an agreement, whose tendency was to prevent competition, was held to be void by the principles of the common law, because it was against public policy and injurious to the interests of the state.

"Contracts creating monopolies are null and void as being contrary to public policy." (2 Addison on Cont. 743.) All grants creating monopolies are made void by the common law. 7 Bacon's Abridgment, page 22. In the case of the monopolies (Coke's Reports, vol. 6, part XI, page 84), it was decided as long ago as the forty-fourth year of the reign of Queen Elizabeth, that "a grant to the plaintiff of the sole making of cars within the realm was utterly void, and that for two reasons: 1. That it is a monopoly and against the common law. 2. That it is against divers acts of Parliament," etc. (*Bell v. Leggett*, 7 N. Y. 176; *Trist v. Child*, 21 Wall. 441.)

If contracts and grants, whose tendency is to create monopolies, are void at common law, then where a corporation is organized under a general statute, a provision in the declaration of its corporate purposes, the necessary effect of which is the creation of a monopoly, will also be void.

(The rest of the opinion discusses the terms and meaning of particular statutes and ordinances, and concludes with a statement of the necessity for setting limits to the acquisitions of property by corporations.)



## SECTION THREE.

**Memphis & C. R. Co. v. Wood, 88 Ala. 630; 7 Southern 108.**

**Even if stock can be held it can not be voted for the benefit of the holding corporation and to the detriment of the other.**

While the question is not decided whether one corporation may own stock in another, yet even if it may so own it, it has no right to vote it, in case the two corporations are rivals and the ownership by one of the majority of the stock of the other would tend to bring the latter under the control of the former, and more so for the former's use than for the latter's benefit, thus tending to injure the prosperity of the latter, to impair its earnings and to prejudice the rights of its minority stockholders.<sup>1</sup>

## SECTION FOUR.

**Pennsylvania R. Co. v. Commonwealth, —Pa.—; 7 Atlantic 368.**

**Railroad corporation enjoined from obtaining control of competing line by buying its stock.**

Suit by the attorney-general in the name of the commonwealth to enjoin the Pennsylvania Railroad Company from obtaining and exercising control of the South Pennsylvania Railroad Company. The acts sought to be enjoined are alleged to violate the constitution.<sup>2</sup> The preliminary injunction was continued. The lines are found to be substantially parallel. Mr. Roberts, as president of the Pennsylvania Railroad Company (which operates a part of the line of the Pennsylvania Company), arranged with Mr. Morgan, representing the stock-

<sup>1</sup> See also *George v. Central R. & B. Co. (Ala.)*; 14 So. 752.

The power to vote is, however, not obnoxious to the constitutional provision against combinations where the voting is done by a foreign corporation not engaged in matters competing with domestic corporations. *Clarke v. Richmond, etc., Co.*, 10 C. C. A. 887.

<sup>2</sup> Of 1874, section 4, article 17: "No railroad, canal or other corporation, or the lessees, purchasers or managers of any railroad or canal corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning or having under its control a parallel or competing line."



holders of the other company to the effect that Mr. Morgan would "procure by purchase and legal assignment and transfer to such persons" as should be designated by Mr. Roberts "the securities and contracts and control of the South Pennsylvania enterprise," at least sixty per cent of the subscription, the entire stock of the American Construction Co. (contractor for the line), and an assignment of all the capital stock, bonds and securities of the South Pennsylvania Railroad Company, not held by the syndicate, which stock "shall be adequate to insure the control of the corporation of the South Pennsylvania Railroad Company."

Defendants contend that an arrangement to buy the stock of another road does not violate the constitutional provision in question. They rely upon the decision that the ownership of the stock of a corporation does not give control of the corporation.<sup>1</sup> The decision of the question of control was not called for in that case, which was already decided on another and fundamental point.<sup>2</sup> But waiving this point, the decision still makes a very narrow distinction. The chief justice, speaking of the stockholding road, says: "Practically it may control the company, but the company alone controls the road;" but this is merely a different way of stating the truism that a corporation is controlled by its stockholders. That they do it through the agency of a board of directors and other officers does not alter the fact, and Mr. Roberts so understood it, and the various documents clearly intend to obtain the control of the South Pennsylvania Railroad Company, the officers and directors of which, as also of the construction company, were required to resign, and others chosen by Mr. Roberts were to be installed. Nor is the constitutional restriction to be limited to a completed railroad; it speaks of "lines" (not "roads" nor "railroad"), and that term is used to denote an intended railroad, as can be seen from its use in the eminent domain statutes.<sup>3</sup>

The constitutional clause could always be defeated if it were inapplicable to a road before its completion, for in such case

<sup>1</sup> Pullman Palace C. C. v. Missouri R. R. Co., 6 Sup. Ct. Rep. 194. frequently had to run the Pullman cars only on such roads as it then "con-

<sup>2</sup> Namely, that the consolidated company was obliged to carry out the contracts as they stood at the time of the consolidation, and conse- trolled" and not on those which it thereafter might control.

<sup>3</sup> Section 2, act of Feb. 19, 1849; section 2, act of July 29, 1866.

the rival road would control the new road and never allow it to be completed. Hence this clause applies to a projected road, surveyed, laid out and in process of construction, which when completed and in operation would actually compete with the road seeking its control. Before completion it is "parallel," and when completed it is "competing." Counsel also invoked the undoubted general principle that the stockholder has the right to sell his stock as he pleases, and that an injunction on the purchaser would really be a denial to the seller of said right.

No opinion need be expressed as to the rights of the individual stockholder. The objectionable act is the sale in combination, thus putting the corporation into the hands of a rival, contrary to public policy, and causing it to lose its power of performing its duties to the public, for which performance it is bound when accepting its franchises, such as eminent domain, which can be exercised only for a public use.<sup>1</sup> Hence, the court above affirms the decree entered below continuing, until final hearing, the preliminary injunction before granted, enjoining the Pennsylvania Railroad Company from purchasing, controlling or in any way obtaining control of, the stock, property, and franchises of the South Pennsylvania Railroad Company; and enjoining the other defendant companies from doing the various acts assigned as their part of the transaction in question.

#### SECTION FIVE.

**Pennsylvania R. Co. v. Commonwealth, — Pa. —; 7 Atlantic 374.**

**Non-competing company restrained from buying stock and obtaining control for the benefit of a competing one.**

Action in chancery to restrain the defendants from making a combination which would result in a violation of the same section of the constitution set forth in the last preceding case. The jurisdiction in chancery was earnestly denied, counsel insisting the action should be *quo warranto*; but it is held that the courts of common pleas have chancery power and jurisdic-

<sup>1</sup> *Sharpless v. Mayor*, 21 Pa. 169; *Olcott v. Supervisors*, 16 Wall. 694; *Bedford R. Co. v. Bowser*, 48 Pa. 29.

tion so far as relates *inter alia* "to the prevention or restraint of the commission or continuance of acts contrary to law and prejudicial to the interests of the community or the rights of individuals"<sup>1</sup> which clearly covers an act which is done in violation of the constitution; it need not be considered whether quo warranto is also proper. The facts are as follows: The Pennsylvania Railroad Company holds by lease certain roads; the Beech Creek, Clearfield & Southwestern owns certain roads which compete with the former; the Northern Central Railway Company is not a competing line; the Pennsylvania Railroad company owns six-thirteenths of the stock; the business relations between the two are close and harmonious. The Pennsylvania Railroad Company is about to buy sixty per cent of the stock of the Beech Creek company, said stock, however, to be transferred to and held by the Northern Central Railway Company. The purchase is really for the purposes of the Pennsylvania Railroad Company and its object is to disable or destroy the competition between its said leased lines and the Beech Creek road; to allow it to buy and hold in its own name a majority of the Beech Creek stock would be a violation of the constitution clause in question; the language of that clause is different from the words recently construed.<sup>2</sup> There the contract spoke of "roads" under the control of the defendant; and it was declared that to own the majority of the stock of a railroad corporation did not give control of the road, although it might give control of the company.

The constitution, however, speaks of control of the company; evidently, therefore, the case referred to is not in point and need not be further considered; indeed, it was admitted that the Pennsylvania Railroad Company is prohibited from buying the stock; and it is urged that the Northern Central Railway Company is to be treated as the purchaser, because it is to hold the stock, and that it, being a non-competing road, may lawfully do so. But the offer of purchase comes from the Pennsylvania Railroad Company; its officers carried on the negotiations; it is to furnish the consideration by guaranteeing the Beech Creek Company's bonds, and its interests are chiefly

<sup>1</sup>Section 18, Act of 1836, P. L. 789; *ouri Pacific R. Co.*, 6 Supreme Court act of 1857, P. L. 89. Reporter 194.

<sup>2</sup>*Pullman Palace Car Co. v. Mis-*

and avowedly to be advanced by the transaction. This is done avowedly to evade the constitution; the title in the Northern Central is merely to disguise the truth; the court affirms the ruling below continuing the preliminary injunction to final hearing.

### SECTION SIX.

**Howe v. Boston Carpet Co., 16 Gray 493.**

#### **Rule as to corporations owing no public duty.**

Aside from statutory restraints, such as shown in some cases,<sup>1</sup> manufacturing corporations owing no public duty may own stock in other corporations; certainly when taking the same as payment for debt or property sold. It is often necessary that they should take stock under such circumstances.<sup>2</sup>

### SECTION SEVEN.

**Holmes & Griggs Mfg. Co. v. Holmes & Wessel M. Co., 5 N. Y. Supp. 937.**

**Stock of one corporation sold to another; purchaser from latter can not assert illegality in first sale.**

While it is conceded that one corporation has no right to acquire stock in another, yet it is held that when it does obtain

<sup>1</sup> Hood v. New York & N. H. R. R., 22 Conn. 502; Mutual Savings B. & Co., 1 R. I. 812; 3 R. I. 9; Treadwell B. A. v. Meriden Agency Co., 24 Conn. 159. <sup>2</sup> Hodges v. New England Screw v. Salisbury Manuf'g Co., 7 Gray 393.

For a very extensive discussion of the authorities, concluding with decision that the assets of an insolvent corporation can not, against protest of even a single stockholder, be sold simply for stock in another corporation, see Byrne v. S. E. M. Co., (Conn.) 81 Atl. Rep. 833.

Examine also Carter v. P. & R. O. Co. (Pa.), 81 Atl. 391.

How far ownership of stock in other corporation violates statutes against combinations, examine Merz C. C. v. U. S. C. Co., 67 Fed. 414; U. S. v. Knight Co., 15 S. C. R. 249.

In Tod v. Kentucky Union Land Co., 57 Fed. Rep. 47, 58, the court says: "Undoubtedly the general rule is that a corporation has no implied power to acquire shares in another for the purpose of controlling it: Marble Co. v. Harvey, 92 Tenn. —; 20 S. W. 427; this would be contrary to the well understood public policy concerning such companies." The court then finds the purchase in question to be authorized by statutes. Examine also 10 C. C. A. 393, 415.

such stock and sells it to a third person, taking his note therefor, that he is bound to pay the note and can not defend thereon by alleging the plaintiff's wrong in obtaining the stock. Such wrong can be alleged in a proceeding only by the state to forfeit the corporate charter for its violation, and to dissolve and wind up the corporation. The action on the note is upon a perfectly legal contract given for a legal consideration; that is to say, the stock, the title to which was vested in the plaintiff and by it transferred to the maker of the note—the original contract under which the plaintiff obtained the stock in question—is not at all before the court, and whatever may have been said in other states, it is to be here held that such contract is not void but only voidable, and that the title to the stock passed first to the plaintiff corporation and then from it to the maker of the note.<sup>1</sup>

#### SECTION EIGHT.

**Hill et al. v. Nisbet et al., 100 Indiana 341.**

#### **Purchase by one railroad corporation of stock in another upheld.**

The statute allows the consolidation of railroad corporations; hence it is not against public policy to incorporate a company with a view of its ultimately becoming consolidated with an existing corporation.

The proposition is stated broadly, in many cases, that one corporation can not, without express statutory authority, become the owner of any portion of the stock of another corporation.<sup>2</sup> It is said that if this were not so a banking corporation could become the operator of a railroad, and *vice versa*; hence, where the purchase amounts to engaging in a business other than that authorized by the charter of the purchasing corporation, such purchase is *ultra vires*, and this is so “not because the purchase is stock, but because the business is outside the scope of its charter.” The question is, whether,

<sup>1</sup> The case was affirmed in 27 N. Co. v. Lewiston S. B., 68 Maine 43; E. 881, noticed more fully on another Central R. R. Co. v. Collins, 40 Ga. 582; Sumner v. Marcy, 8 Wood & page.

<sup>2</sup> Pearce v. Madison, etc., Co., 21 M. 105; Franklin Bank v. Commercial How. 441; Mutual, etc., v. Meriden Bank, 86 Ohio St. 850 (38 Am. Rep. Agency Co., 24 Conn. 159; Franklin 594).

under all the circumstances, the purchase was a "necessary or reasonable means of carrying out the object for which the corporation was created, or one which, under the statute, it might accomplish."

Railroad corporations have statutory power<sup>1</sup> to acquire, by purchase or contract, real and personal property "necessary to accomplish the object for which the corporation is created," as also to acquire the property of and consolidate with uncompleted intersecting and connecting lines; therefore it can not be said that the purchase of the stock was unauthorized.

The presumption must be indulged in that the purchase of the stock was a necessary or reasonable means to the accomplishment of the object which the corporation had in view;<sup>2</sup> it had the right to choose the means by which it would exercise its powers.<sup>3</sup>

That some of the directors stood in a fiduciary relation to both parties, does not make the purchase void, but only voidable.<sup>4</sup> It simply gives the right of redemption provided it is exercised in a reasonable time, and before the intervention of new equities.<sup>5</sup>

Complainants should show a perfect equity to be entitled to any relief,<sup>6</sup> and relief will be refused if new equities have been acquired without their protest and objection;<sup>7</sup> and they must show some interest, or relief will be refused where they have paid nothing on their stock.<sup>8</sup>

Complainants were the majority of the directors when the purchase was made; they have paid nothing on their own subscriptions; the stock was then sold to defendants in order to realize money for the payment of the corporation's debts, and hence complainants can not now be allowed to question its purchase by their corporation or its resale by it to defendants. Bill dismissed.

<sup>1</sup> Secs. 3951, 3903, R. S. 1881.

<sup>2</sup> *Ryan v. Leavenworth, etc., Co.*, 21 Kan. 365.

<sup>3</sup> *City of Bridgeport v. Housatonic, etc., Co.*, 15 Conn. 475.

<sup>4</sup> *Twin-Lick Oil Co. v. Marbury*, 1 Otto 587; *Kitchen v. St. Louis, etc., R. W. Co.*, 69 Mo. 224; *Merrick v. Peru Coal Co.*, 61 Ill. 472.

<sup>5</sup> *Bristol, etc., v. Probasco*, 64 Ind.

406; *Ward v. Polk*, 70 Ind. 309; *Pratt v. Luther*, 45 Ind. 250; *Port v. Russell*, 36 Ind. 60; 10 Am. R. S.

<sup>6</sup> *Piatt v. Smith*, 12 Ohio St. 561; *Howard v. Babcock*, 7 Ohio 405.

<sup>7</sup> *Samuel v. Halladay*, 1 Woolw. 400.

<sup>8</sup> *Busey v. Hooper*, 35 Md. 15; 6 Am. R. 350.

## SECTION NINE.

## Sundry instances.

Statute forbidding one corporation from buying the stocks, bonds or securities of another is not violated when the one lends money to the other, taking bonds as collateral, and finally becomes their owner. *County Court v. Baltimore & Ohio R. Co.*, 35 Fed. 161, followed in *Baltimore & Ohio R. Co. v. Ford*, 35 Fed. 170.

A constituent corporation having sold its property and received the consolidated company's stock in payment can not be enjoined by the latter from transferring such stock. *American Water Works Co. v. Venner*, 18 N. Y. Supp. 379.

A corporation may buy up its own stock, if it be not detrimental to its creditors. *First National Bank v. Salem C. F. M. Co.*, 39 Fed. Rep. 89, and cases there cited; see also *Rollins v. Shaver Wagon and Carriage Co.*, —Iowa—; 45 N. W. 1037; *Bialock v. Kernerville*, 14 S. E. 501; *Hegie v. B. & L. A.*, —N. C.—; 12 S. E. 275.

Stock deposited for the purpose of being so voted as to control a corporation, not for its own nor for the public's best interests, but to foster monopoly and check competition, will be enjoined from being voted. *Clark v. Central R. & B. Co.*, 50 Fed. 338.

A corporation can not be an incorporator<sup>1</sup> of another corporation; court says that the numerous authorities cited from other states are inapplicable, as those states are governed by different laws. *Factors, etc., Ins. Co. v. N. H. P. Co.*, 37 La. Ann. 233. See also *Denny v. Schram* (Wash.), 32 Pac. Rep. 1002.

No recovery can be had upon the subscription by an iron company to the stock of a railroad company. Only individuals have the right to form corporations. *Valley Ry. Co. v. Lake Erie Iron Co.*, —Ohio—; 18 N. E. 486; citing 1 *Morawetz, Priv. Corp.*, § 433; *Railroad Co. v. Railroad Co.*, 31 N. J. Eq. 435; *Franklin Co. v. Bank*, 68 Me. 43; *Railroad Co. v. Collins*, 40 Ga. 582.

A collateral attack upon the validity of the subscription of

<sup>1</sup> Nor an "employee" in meaning of statute so as to receive priority for demand of wages. *Dukes v. Love*, 97 Indiana 841.



a construction company to a railroad company can not be made by a land owner whose land is sought to be condemned; at least, not where the New Jersey laws are not proved. Large amounts have been expended and neither the subscriber nor any one else questions the validity of the subscription. *Rochester, H. & L. R. Co. v. Babcock*, — N. Y. —; 17 N. E. 678.

The National Corporation Reporter contains (Vol. 9, p. 357) a very instructive discussion by Mr. Horace E. Ware, of the rights of one corporation to hold stock in another.

He groups the following as authorities, denying such right: *Sumner v. Marcy*, 3 Woodb. & M. 105 (timber company should not buy stock in a bank to obtain its management and have it discount the timber company's notes); *Mechanics' Mutual, etc., Ass'n v. Meriden Agency Co.*, 24 Conn. 159 (insurance agency can not subscribe to stock of savings bank for the purpose of obtaining a loan from latter). *Berry v. Bates*, 24 Barb. 199 (insurance company can not subscribe to the stock of another); *Central R. R. Co. v. Collins*, 40 Ga. 582; *Hazelhurst v. Savannah, etc., R. R.*, 43 Ga. 13 (R. R. Co. should not buy stock of another to influence its management); *Franklin v. Lewiston S. B.*, 68 Me. 43 (savings bank should not buy stock in a manufacturing Co.); *Denny Hotel Co. v. Schram*, 32 Pacific R., 6 Wash. 134 (corporation is not a "person," in meaning of that statute which allows persons to be incorporators); see also, *Central R. R. Co. v. Penn. R. R. Co.*, 31 N. J. Eq. 475; *Buckeye, Marble & Co. v. Harvey* (Tenn., 1892), 20 S. W. R. 427; one corporation, especially a foreign one, should not, by purchase of its stock, swallow up another, especially a domestic one, doing a similar business (marble). *Pauly v. Coronado Beach Co. (Cal.)*, 56 Fed. Rep. 428 (defendant not liable to assessment as subscriber to stock of a fruit company); *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350 (construing statute prohibiting bank from owning stock in corporation).

The following cases are grouped as authorities sustaining the right of one corporation to take stock in another: *Howe v. Boston Carpet Co.*, 16 Gray, 493; *First Nat. Bank v. Exchange Nat. Bank*, 92 U. S. 122; corporation may take shares of another in payment of a debt; same view in *Royal Bank of India's case*, L. R., 4 Ch. Appeals 252; *Re BARNED'S BANKING CO.*, L. R., 3 Ch. App. 105.

*Ryan v. Leavenworth, etc., Co.*, 21 Kans. 365 (a R. R. Co.

may purchase stock in another provided it is not for investment, or for purposes not connected directly with the purposes of the purchasing road; the interests of the public would not be prejudiced "if the two companies were consolidated" so as to have a continuous line). *Terry v. Eagle Lock Co.*, 47 Com. 141 (a manufacturing corporation may buy all the stock of another and pay for it with an additional issue of its own). *Booth v. Robinson*, 55 Md. 419 (steam packet company may buy shares in a steamboat company). *Milbank v. N. Y., etc., R. R.*, 64 How. Pr. 20 (ownership of stock in other R. R. Co. sustained, but power to vote it so as to control such other road, denied). *Oelberman v. N. J. & N. R. R.*, 77 Hun 332 (both ownership and power to vote sustained, based on statute).

Partnership associations, organized under Pennsylvania statutes, may own stock in corporations. *Carter v. Producer's and Refiner's Oil Co.* (Pa. Com. Pl.) 24 Pitts. Leg. J. (N. S.); 41 O. S. 380; *Patterson v. Tidewater Pipe Co.*, 12 W. N. C. 452 (Com. Pl.); *Luying v. A. French Spring Co.*, 149 Pa. 308.

*Kennedy v. California Savings Bank* (Cal.), 35 Pacific R. 1039 (a national bank may be assessed as stockholder in a savings bank); to same effect, *National Bank v. Case*, 99 U. S. 628.

Mr. Ware concludes his discussion with the very sound suggestion that those authorities err which declare, as a general and inflexible principle, that one corporation can not hold stock in another. The matter depends upon the circumstances of each particular case; if such holding of stock be conducive to the best business interests of the corporations concerned, and not injurious to the creditors or stockholders of either, or to the general public, or contrary to statute, they should be sustained.

## CHAPTER XVIII.

CONCERNING TAXATION, OR EXEMPTION THEREFROM, OF THE  
SUCCEEDING CORPORATIONS.

Many of the questions discussed in the former chapters are necessarily involved in the consideration of this topic, and the cases herein presented might well have been distributed under their respective heads (*e. g.*, identity of corporation, rights of succeeding corporation, etc., as indeed some have been) in the former chapters; yet, as the topic is one of the utmost importance, involving consequences not alone by way of taxation for one year, but for the whole existence of the corporation concerned, and thus aggregating vast sums, and is thus worthy of special consideration, it has been deemed best, and most serviceable withal to the reader, to separately classify and group these cases.

The foundation of decisions rests so largely upon the construing of statutes, that little can be done by way of deduction of principles, nevertheless the analysis of the cases themselves is presented for the purpose of showing upon what facts the statutes are applicable.

The rules, so far as they may be learned, declare essentially :

The legislative grant, to a succeeding corporation, of all the rights, franchises and privileges in all respects of the predecessor, confers upon such succeeding corporation the tax exemption of the original corporation.

Such privileges carry with them an obligation upon the succeeding corporation of whatever corresponding burdens, by way of special taxes or otherwise, rested upon the predecessor.

When separable, such portions of the property of a preceding constituent corporation as were under particular exemptions or liabilities, remain in the hands of the succeeding corporation under the same exemption or liability. So also the portions of property in the respective states at times remain subject to the exemptions or liabilities in such states granted or imposed.

The reorganization of a corporation, it, however, remaining

identical with its former entity, does not deprive it of existing tax exemptions; but such exemptions are lost upon the obtaining of a new charter; that is a new creation of corporate capacity; for the laws at that date existing, then determine the status with reference to taxation.

Exemption from taxation does not pass by virtue of the conveyance of a road and its franchises, but requires for its transfer some particular and express description indicating unequivocally the intention of the legislature that it might pass by assignment.

### SECTION ONE.

**The Atlantic & Gulf R. R. Co. v. Allen, 15 Florida 687.**

**Purchasing company obtains seller's tax exemption.**

Bill to enjoin collection of tax on railroad property; the company originally owning the road had a qualified exemption from taxation; the supreme court, reversing the court below, holds that this exemption is available to the complainant, the purchaser of the road.

The statute authorized the sale of the road "and all the rights, franchises and privileges of the said Pensacola and Georgia Railroad Company applicable to and connected with said branch road, in all respects as the same are and have been by law vested in said Pensacola and Georgia Railroad Company."<sup>1</sup>

"There is no room for doubt as to the effect of this legislation. It is plain and direct. It is as positive and definite as it could be made." It passes all the *rights, franchises* and *privileges* in *all respects* as the same were by law vested, etc. "A right of exemption from taxation can be passed under the general language of 'all the rights' the same as any other right. We can see no difference." "The term 'all rights' embraces each right, and there is no room for the least doubt on the subject." Similar acts have been construed in the same way."

<sup>1</sup> Chapter 1578, Section 1, Laws of Florida.

<sup>2</sup> Trask v. Maguire, 18 Wall. 405; Humphrey v. Pegues, 16 Wall. 248.

## SECTION TWO.

**Lake Shore & Michigan Southern Ry. Co. v. People, 46 Mich. 198.**

**Tax as to stock dividends remains on same basis as it was before consolidation.**

Assumpsit by the people to recover amount of taxes upon the capital stock of the Lake Shore & Michigan Southern Railway Company. The facts were that the Michigan Southern Railway Company became a corporation under act 113 of 1846, and in 1855, under act 138, it became consolidated with an Indiana road under the name of the Michigan Southern & Northern Indiana Railroad Company; and that company became consolidated in 1869, under statutes of Michigan and three other states, with corporations existing under the laws of said three states; on the occasion of these consolidations the shares in the new company were exchanged with the holders thereof for an equal amount at par value of shares of the original companies.

The opinion of Campbell, J., in which Graves, J., concurs (Cooley not participating), holds on this point with the opinion of Marston, C. J., that stock dividends and other issues of stock, proportioned to the previous holdings of the shareholders, stand on the same footing as such previous holdings for taxable purposes, and should be estimated in making up the assessments as far as they are considered paid in. The arrangements allowing consolidation were intended to leave the Michigan company, which is the only one over which this state has any actual power of enforcing its laws directly, in its original position as to stock and loans, and to annex thereto those additions which are made proportional to the original amounts. The Michigan investment can never be less than it was in the first place, and if gains are made in the form of paid up stock, each dollar of stock must be treated as having earned its share. There is no other possible way to discriminate between the Michigan and foreign investments, for neither stock nor loans are very often expended specifically in one place more than in another.

**SECTION THREE.**

**State v. Northern Pacific R. Co., 86 Minn. 207; 80 N. W. R. 663.**

**Successor company, obtaining all privileges, is held also subject to special tax.**

A company had the right to build a line of road, and was under obligation to pay a three per cent tax upon its gross earnings. It failed to complete the work, whereupon a statute was enacted declaring the company's rights forfeited to the state without merger or extinguishment, and providing that any company, acting pursuant to the act, should become entitled to and invested with all and singular the rights, privileges, immunities, franchises, lands and property appertaining to the portion of the road it shall complete, and which had formerly been held by the other road.

It is held that the new company is subject to the same three per cent tax on its earnings as the former would have been had it completed the line. The new company obtained certain immunities and privileges, formerly belonging to the old company, and must take them in connection with the attendant burdens which had been imposed on them when granted to the old company.

**SECTION FOUR.**

**Bailey v. Railroad Co., 22 Wall. 604.**

**Consolidation liable for constituent's tax on dividend scrip.**

A railroad company having accumulated a large amount of property in excess of its capital, issued what it termed "interest certificates" to its stockholders, entitling to share ratably thereon in the future earnings of the company; these are held to be dividends in scrip and taxable under the federal revenue acts; and such company being thereafter consolidated with another, the new company is held liable for such tax, because the acts of consolidation preserved all rights of creditors and all liens and made the new corporation liable for all debts and liabilities of the old ones.

## SECTION FIVE.

**The state, the Easton Delaware Bridge Co. Prosecutor, v. Albert K. Metz, Collector, 32 New Jersey Law Reports, 199.**

**A State should tax only that portion in value within its own boundaries.**

The corporation owes its existence to the acts of the legislatures of New Jersey and Pennsylvania, each made dependent on the other, neither to take effect until the other be passed; the corporate purpose is to build a bridge between the two states. The corporation exists in each state, but of a peculiar character. "The private corporation of this state is blended with a foreign corporation of another state." It can act as one body in either state and is liable to be treated as such. It is subject to taxation in New Jersey; taxation should go upon equitable principles; the corporate purpose in New Jersey is to build only one-half of said bridge, *i. e.*, to the middle of the stream, hence the corporation should be assessed in New Jersey only to the extent of one-half of its real estate, etc., capital, surplus, etc.<sup>1</sup>

## SECTION SIX.

**State Treasurer v. Auditor General, 46 Mich. 229; 9 N. W. R. 258.**

**When the constituents are of several states the consolidation is not incorporated under Michigan law so as to be subject to the general tax laws.**

Mandamus asked by the state treasurer of Michigan to compel the auditor-general to levy the general railroad tax against the Lake Shore & Michigan Southern Railroad Company. The facts being as follows:

The Michigan Southern Railroad Company was organized in 1846, under special charter, by which it was to pay a cer-

<sup>1</sup> A view contrary to the principle representing the aggregate of the of this decision is held in *State v. former two*, and representing roads Seaboard & R. R. Co., 52 Fed. 450. in two states, is held liable as a domestic corporation being in- domestic road for a tax on the entire creased by consolidation with a for- capital. eign one, and having a new capital,



tain per cent tax annually on its capital in lieu of all other taxes. In 1855 it was allowed, by law, to consolidate with the Northern Indiana Railroad Company; the corporation thus to be organized was to remain subject to the same rate of tax as if no consolidation had taken place; the tax was, however, to be only on such portion of the whole capital as was employed in Michigan. The consolidation was effected, and the result was treated as a new corporation from that time on. The same legislature also passed a general law for the incorporation of railroads, by which "every corporation formed" under its provisions was required to pay an annual tax of one per cent on its capital stock paid in.

The general railroad law of 1855 allowed competing lines to consolidate, and provided that, when the proceedings were completed and duly filed with the secretary of state, the consolidating corporations "shall be merged in the new corporation provided for in such agreement to be known by the corporate name therein mentioned."<sup>1</sup> The amendatory railroad act of 1869 provided for an annual tax upon railroads in general at one per cent on their capital stock paid in, as also upon such sums of money "as shall from time to time be invested in the original constructing and stocking, or in any new constructing or stocking of said road."<sup>2</sup> After the passage of said act and in the same year the Michigan Southern & Northern Indiana Railroad Company entered into consolidation agreements with certain Ohio, Pennsylvania and New York corporations, such agreement being authorized in these several states by statutes thereof, and being filed in Michigan as provided by law with the secretary of state. The consolidated company was now called the Lake Shore & Michigan Southern Railroad Company and it continued to pay taxes on same basis on which they were previously assessed against the Michigan Southern & Northern Indiana Railroad Company (*i. e.*, only on the proportion of capital employed in Michigan).

The acts of 1871 revised the railroad laws, and another rate of tax was fixed upon railroads, according to their gross income, and in 1873 this was apportioned according to the part within Michigan.

It is urged by relator that said road ever since the last con-

<sup>1</sup> Laws 1855, pp. 174. 175.

<sup>2</sup> Laws 1869, p. 262.

solidation (in 1869) should have been taxed under the several general tax laws; whereas, in behalf of the company, it is answered that they should have been and were properly taxed under the provisions of their special incorporations; and in this view the court coincides.

Attention is called to the fact that if the road had been taxed prior to 1869 under the general laws it would have paid on its entire capital (\$50,000,000), and not only on the proportion in Michigan, hence about nine times as much as it did pay; and it is said the legislature could not have intended to tax it so much higher than other roads, and would have had no power to do so, as it would have been an attempt to obtain revenue from property situated in and belonging in other states, which could not by any implication of law or legal intendment be held or deemed to be property subject to or protected by the laws of Michigan.

The act of 1873, however, makes an apportionment, and the question is whether the legislature thus shows an intent to bring said road under the general act, having overcome the injustice of the prior acts. Therefore, the question is: Can said company be deemed to have been "formed under the provisions" of the act of 1873? It is urged that it should be so considered because it could not otherwise have had existence in the state.

Had all the consolidating companies been Michigan corporations, and proceeded to consolidate under the act of 1873, there would be little or no difficulty in saying that they thereby ceased to exist, and that the resultant corporation was "formed under the provisions" of that act. A state may thus authorize several corporations, the same as it may individuals, to organize into a new corporation.<sup>1</sup> But this corporation exercises powers emanating from six different states through which it operates its lines. How can it be said to be "formed under" the general law of Michigan any more than that of Ohio or any other of said states? How can the laws of Michigan authorize it to operate a railroad in New York? If one state grants the charter and the other merely gives permission to operate there, it is a corporation of the first state; but if two

<sup>1</sup> *Bishop v. Brainard*, 28 Conn. 289; *Clearwater v. Meredith*, 1 Wall. 25; *State v. Maine Central R. Co.*, 66 Me. 488; S. C., 96 U. S. 499.

states "incorporate the same persons for the same purpose, with identical powers, there would, in contemplation of law, be two corporations deriving their authority from different sources." The authority to consolidate the Lake Shore lines was not claimed under the laws of Michigan alone, and although all the others have been merged in one great corporation, yet this is no more effectual under the laws of Michigan than under those of any other of the assenting states. Hence it is not a corporation formed under the general railroad laws of Michigan, which were powerless to confer upon the new corporation all the powers and charge it with all the duties of the several old corporations; the state might assent to the consolidation, and this is all it assumed to do.

It is unnecessary to speculate upon or to decide the interesting questions whether, by the concurrent action of all the states, said company has become a corporation in the full sense, or is merely a corporation *de facto*, or only a business union of several different companies under one common name, recognized by the laws of the several states for the purposes of transacting business, holding property or bringing suits; or whether the old corporations are to be deemed still in existence, and exercising their several powers in their respective states in the name of the consolidation.

#### SECTION SEVEN.

**Chicago & Northwestern Ry. Co. v. Auditor General, 53 Mich. 91; 18 N. W. 586.**

#### **Same topic further considered.**

Suit to determine the construction of the railroad tax law of Michigan. The Peninsular Railroad Company was incorporated under the Michigan general laws,<sup>1</sup> and operated a road previous to October 21, 1864; the laws allowed consolidation. This road was consolidated on said date with the Chicago & Northwestern Railway Company, which was then operating lines in Iowa and Wisconsin; the consolidated company took the name of the latter company, and thereafter from time to time consolidated with still other companies owning and operating

<sup>1</sup> February 12, 1855; Sp. Laws 1855, p. 153; Comp. Laws 1857, p. 681.

lines in different states, and operated other lines as lessee in perpetuity, and also operated the roads of other companies; these last named maintained their corporate existence, but all accounts were made a part of the general accounts of the Chicago & Northwestern Railway Company, without discrimination.

The law of 1873 required the railroads to report their business, their receipts and expenditures, to the auditor-general; and imposed a certain tax upon the gross earnings of the roads; which, in case of companies "formed under the provisions" of the Michigan statutes, and having roads lying partly within and partly without the state, were apportioned to the part within the state in the proportion which it bore to the whole. The law of 1873 also repealed the former laws and declared that the organization of all corporations under the provisions of either of said former acts, should be deemed and taken to be organizations under the act of 1873.

The question, therefore, is whether the complainant company, the Chicago & Northwestern Railway Company, since the consolidation, is to be considered a company formed under the provisions of the Michigan statute, and if so, whether its road lies partly within and partly without the state.

It is true that the consolidation of a Michigan corporation with a corporation existing in other states is accomplished by consent of the State of Michigan, and hence it is asserted that the consolidated company is formed under the provisions of the Michigan statute; but this can apply only to the first consolidation of 1874, which was made with the state's consent; the latter were without consent, and indeed contrary to the statute, which forbade competing roads from consolidating. Furthermore it can not be supposed that the state meant that the law should apply to such roads as consolidated outside of the state, for if so, it would enable them by their own volition to deprive the state of a large part of the tax, by consolidating with extensive lines at a distance, and thereby reducing the proportion which the part in Michigan bears to the whole. Difficult it is to determine exactly the status of such a corporation.<sup>1</sup>

It is familiar law that each corporation has its existence and

<sup>1</sup> Lake Shore, etc. Ry. Co. v. People, 46 Mich. 198; S. C., 9 N. W. R. 249.

residence, so far as the term can be applicable to the artificial person, within the territory of the sovereignty creating it.<sup>1</sup> It may exercise corporate functions in another sovereignty, but it is impossible to conceive of one joint act, performed simultaneously by two sovereign states, which shall bring a single corporation into being, except it be by compact or treaty. A consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed; and each state legislates in respect to the road within its own limits and which was constructed under its grant of corporate powers the same as it did before. It can not follow the new organization with its legislation, into another state.<sup>2</sup> The consolidated company exists in each state under the laws of that state alone.<sup>3</sup> Hence, though the consolidating companies for most purposes are not, after the consolidation, to be separately regarded, yet in each state the consolidated company is deemed to stand in place of the corporation which it there succeeded, and of its members, and consequently to be a citizen of that state for many purposes, while in the other state it would stand in the place of the other corporation in respect to citizenship there.<sup>4</sup> Hence it follows that the Michigan corporation which has been consolidated with complainant, is alone, of the consolidated organizations, to be considered a company formed under the laws of Michigan.

#### SECTION EIGHT.

**State v. Butler, 2 Pickle (Tenn.) 614; 8 S. W. 586.**

**Original corporation recognized as entitled to exemption, although reorganized by receiving new stockholders.**

A bank became insolvent, but receiving assistance, paid its debts in full. The franchise remained operative, never having

<sup>1</sup> *Marshall v. Baltimore, etc., R. Co.*, 46 Mich. 193; 9 N. W. R. 249; *Peik Co.*, 16 How. 814; *Chicago, etc., R. Co. v. C. & N. W. Ry. Co.*, 94 U. S. 164; *Co. v. Whitton*, 18 Wall. 270; *Miller Chicago & N. W. R. Co. v. Whitton, v. Dows*, 94 U. S. 444; *Vose v. Reed*, 18 Wall. 283.

<sup>2</sup> *Woods* 647; *Allegheny Co. v. Cleveland, etc., R. Co.*, 51 Pa. St. 228; *Lake Shore, etc., Ry. Co. v. People*, 46 Mich. 193; S. C., 9 N. W. R. 249.

<sup>3</sup> *Delaware Railroad Tax*, 18 Wall. 206, 228; *Lake Shore etc., v. People*,

<sup>3</sup> *Miller v. Dows*, 94 U. S. 444, 447.

<sup>4</sup> *Ohio, etc., Co. v. Wheeler*, 1 Black 286; *C. & N. W. v. Whitton*, *supra*; *Allegheny Co. v. Cleveland*, *supra*; *Texas, etc., R. Co. v. McAllister*, 12 Am. & Eng. Ry. C. 289.

been surrendered by the stockholders nor declared forfeited by the state. An insurance company was in existence, the stockholders of which deemed the bank's franchise valuable; it was therefore agreed that all the stockholders of the bank should transfer their stock to a trustee, who held it in trust for the stockholders of the insurance company, which transferred to him all its assets; these equaled eighty-five cents on the dollar of the par value of the bank's stock, and the other fifteen cents were made up by cash furnished by the insurance company stockholders. The latter company was then dissolved; the trustee paid off the former stockholders of the bank, and the new stockholders from thence on conducted the bank. The original charter of the bank exempted it from certain taxes, and the new stockholders claimed that this exemption continued to it in its reorganized state. The claim was resisted by the tax collector; he asserted there was a merger of the bank into the insurance company, in which contention he is sustained by one member of the court, but the others hold to the contrary, and declare that the transaction was entirely done by the parties in their individual capacities. It was a case simply of the same individuals becoming stockholders in two different corporations, and that the defendant is a duly organized banking corporation, possessed of all the powers, privileges and immunities of the Chattanooga Savings Institution, under the charter of 1856.

#### SECTION NINE.

**State, Camden, etc., Prosecutor, v. Woodruff, 36 N. J. L. 94.**

**Consolidation held entitled to constituent's exemption.**

Certiorari by the plaintiff. The State, Camden & Amboy Railroad and Transportation Company, prosecutors, against Woodruff as receiver of taxes, to establish exemption of certain lots from taxation. Granted.

The title to some of the lots occupied and used for the necessary purposes of the railroad company is in the Delaware & Raritan Canal Company, and it is insisted that such lots are not exempt.

The act of February 15, 1831, consolidates these companies

with an express provision that such consolidation shall be subject to all the provisions, reservations and conditions contained in their original charters. This carries the exemption to all property owned by said companies which is necessary for the uses of either. There is an absolute community of interest between them, and so far as taxation is concerned, it matters not to which company the estate may have been conveyed.

#### SECTION TEN.

**Humphrey v. Pegues, 16 Wall. 244.**

**Statute conferring exemptions contained in a charter held to confer all contained in charter as amended.**

The act *incorporating* the Northeastern Railroad Company contained no exemption from taxation; but in 1855 the legislature passed an act to amend the *charter* of said company by which act the stock and real estate were declared exempt from taxation. The Cherow & Darlington R. R. Co. existed since 1849, having no exemption from taxation; it had not built its road; on December 17, 1863, the legislature passed an act amendatory of that company's charter, and providing "That all the powers, rights and privileges granted by the charter of the Northeastern Railroad Company are hereby granted to the Cherow & Darlington Railroad Company, and subject to the conditions therein contained." Upon this statement the state contended that the latter company received only those privileges which existed in the Northeastern *charter*, as it stood prior to 1855, whereas the company insisted that it was entitled to the exemption from taxation provided for in the charter *as amended* in 1855; this view was sustained by the court.

The first act was expressed as creating the incorporation; the second, using a synonymous expression, purported to amend its charter. The words charter and act of incorporation were used convertibly. Whether it be said that the right and privileges conferred upon the Northeastern, as they stood in 1863, existed in its charter or were derived from its incorporation, amounts to the same thing. The exemption was a most valuable privilege. The road which had so long lain



idle was evidently built upon the strength of this privilege. Such was evidently the legislative intention; this is corroborated by the omission of reference to the original act of incorporation; thus intending to grant all the powers and privileges which had been at any time granted to that road.

#### SECTION ELEVEN.

**Tomlinson v. Branch, 15 Wall. 460.**

**Property derived from each constituent remains under original exemption.**

One road having its property exempt from taxation for a limited time is consolidated with one having a perpetual exemption; the property derived from each remains under its original benefit or burden.<sup>1</sup>

#### SECTION TWELVE.

**Philadelphia & Wilmington R. R. Co., v. Maryland,<sup>2</sup> 10 Howard 376.**

**Consolidation has only such portions exempt as were so originally.**

Several roads were consolidated with the Philadelphia, Wilmington & Baltimore Railroad Co., the new corporation keeping this name. Two of these roads were, by their charter, exempt from taxation, but the Philadelphia, Wilmington & Baltimore was not thus exempt. The law authorizing the consolidation declared that the new corporation should be entitled to all the powers and privileges and advantages at that time belonging to the other two companies. Under this clause it was claimed that the new company should be exempt from taxation. It is held, however, that only such portions as were brought in by the exempt roads remain exempt. The evident meaning of the proviso is said to be that whatever privileges and advantages either of said roads possessed should in like

<sup>1</sup> Following the Philadelphia, etc., South Carolina, etc., Co. v. The Co. v. Maryland, 10 How. 376, and Columbia, etc., Co., 13 Richardson's distinguishing South Carolina, etc., Equity 339.

Co. v. Blake, 9 Richardson, 333; State v. Hood, 15 Richardson 177; The Wilmington & Baltimore. <sup>2</sup> Name should be Philadelphia,

manner be held and possessed by the new company, to the extent of the road they had respectively occupied before the union; that it should stand in their place.

### SECTION THIRTEEN.

**Chesapeake & Ohio R. R. Co. v. Virginia, 94 U. S. 718.**

**Consolidation's exemption limited to that portion of property  
derived from exempt constituent.**

The Covington & Ohio Railroad Company, owned by the state, being in construction through Virginia, was delayed by the war. The state, thereafter, being anxious to have the work resumed, passed an act February 26, 1866, by which any responsible capitalists could organize, under the same name, and were then to have "all the rights, interests and privileges of whatever kind, in and to the Covington & Ohio Railroad, and appurtenances thereto belonging, the property of the state." The act provided also, that there was to be no taxation upon the property of said company until the profits of said company shall amount to ten per cent a year on its capital. By subsequent laws the company was allowed to consolidate with the Virginia Central Railroad Company. The consolidated roads were to constitute one corporation, the new corporation to be known as "The Chesapeake & Ohio Railroad Company," and to be vested with all the rights, privileges and franchises and property which may have been vested in either company prior to the act of consolidation. It was also provided that the Virginia Central might contract with the Covington & Ohio, to build from Covington to the Ohio river, and, in the event such contract be made, the Virginia Central was to be known as the Chesapeake & Ohio Railroad Company, and was to be entitled to all the benefits of the charter of the Covington & Ohio Railroad Company, and to all the rights, interests and privileges which by this act are conferred upon the Chesapeake & Ohio Railroad Company when organized. The contract thus authorized was made August 31, 1868, with the Virginia Central, and the Chesapeake & Ohio Railroad Company became duly authorized. The profits never amounted to ten per cent per annum on the capital. Thereafter the state levied the gen-

eral taxes against the company, and the courts sustained the levy.

It is said by the court that the act of February 26, 1866, proved ineffectual. The Covington & Ohio Railroad Company was not formed. Accordingly on February 26, 1867, the legislature of West Virginia, and on March 1, 1867, that of Virginia, each passed another act covering two alternative propositions, viz.: first, the Covington & Ohio which might be organized might consolidate with the Virginia Central, and two others named, or either of them; such consolidated company, if effected, was to possess all the rights, privileges, franchises and property which might have vested in either company prior to the act of consolidation.

The second proposition was made to the Virginia Central alone, to the effect that it might contract with the Covington & Ohio Railroad commissioners (representing the state) for the construction of a road from Covington to the Ohio river; and, in the event such contract is made, the said Virginia Central shall be known as the Chesapeake & Ohio Railroad Company, and shall be entitled to all the benefits of the charter of the Covington & Ohio Railroad, and to all the rights, interests and privileges which by this act are conferred upon the Chesapeake & Ohio Railroad Company when organized.

The first proposition failed; there could be no consolidation with the Covington & Ohio, because that company never came into existence. The second was accepted.

By the contract thus made with the commissioners on behalf of the state, the road became entitled to all the benefits of the charter of the Covington & Ohio Railroad, and to all the rights, interests and privileges which by the statute aforesaid were conferred upon the Chesapeake & Ohio Railroad Company when organized. The question is: How far did this contract exempt the railroad's property, or rather what property did it exempt, from taxation? Had the Covington & Ohio been formed, it would have been exempt from all state taxation of its property, but its charter gave exemption to no other property; and had it been consolidated with the Virginia Central, that portion of the property brought by the Covington & Ohio into the aggregate would have continued exempt. But exemption of other property was not contemplated by the

charter. So much is settled by repeated decisions of this court.<sup>1</sup> In most, if not all of these cases the statute declared that the consolidated companies should possess all the rights and privileges which each of the companies enjoyed under its charter. Yet, it was ruled that those rights and privileges did not extend beyond that portion of the aggregated property which each had held under its charter. There was no express provision nor implication that the property of the Virginia Central should be exempt. The only exemption was of the property of the Covington & Ohio; had that road been organized and had it possessed property and brought the same into a consolidation, then there would have been an exemption to the extent thereof. The consolidated company would have stood in the place of the constituent companies and would have possessed the powers, rights, privileges and immunities which these roads would have severally enjoyed prior to the consolidation, in the portions of the road which had previously belonged to them.<sup>2</sup>

#### SECTION FOURTEEN.

**The Delaware Railroad Tax : *Minot v. The Philadelphia, Wilmington & Baltimore R. R. Co.*, 18 Wall. 206.**

**The consolidation obtains no greater right than belonged to the constituent.**

Bill against the state treasurer and collector of Delaware to enjoin collection of taxes upon the Philadelphia, Wilmington & Baltimore Railroad Company, levied under the act of April 8, 1869, by which railroads were taxed at three per cent upon their net earnings, also one-fourth of one per cent upon the actual cash value of the shares of its capital stock.

<sup>1</sup> Citing *Philadelphia, Wilmington R. Co. v. Alsbrook*, 13 S. C. R. 72. & *Baltimore R. R. Co. v. Maryland*, construing sundry legislative acts, 10 How. 377; *The Delaware Railroad reviewing the authorities and hold-Tax Cases*, 18 Wall. 206; *Tomlinson ing branch lines and subsequently v. Branch*, 15 Wall. 460; *Central R. absorbed roads not exempt from tax-R. and Banking Co. v. Georgia*, 92 ation. U. S. 665. See also *Campbell v. Wiggins*,

<sup>2</sup> The principles of this decision are — *Texas* —; 20 S. W. 730. applied in *Wilmington & Weldon R.*

Said company's origin was as follows: The Delaware & Maryland Railroad Company was incorporated under act of Maryland in 1831, by which its shares of capital stock were exempted from taxation. By act of 1832 of Delaware, the Wilmington & Susquehanna Railroad Company was created; the act provided that the company should pay a tax of eight per cent on the dividends exceeding six per cent of the capital stock actually paid in. In 1835 these two companies were, under acts of these two states, consolidated into one, under the name of the latter company, the Wilmington & Susquehanna Railroad Company. The act of Delaware provided that the holders of the stock, when consolidated, should hold, possess and enjoy all the property, rights and privileges granted to either company by any law of that state or of Maryland. The act of Maryland had a similar provision. The act of Delaware at the same time repealed the provision of the eight per cent tax and provided that the consolidated company should pay a tax of one quarter of one per cent on its capital stock. In 1838 this consolidated company was united with two others, forming the Philadelphia, Wilmington & Baltimore Railroad Company, and were consolidated under that name into one company, with a common stock, by the acts of said two states and of Pennsylvania; the act of Delaware providing that they should constitute one company and be entitled to all the rights, privileges and immunities which each and all enjoyed under their respective charters.

Hence it was claimed that the tax law of 1869 should not be applied to this last company; for if it were, it would violate the several contractual immunities from taxation which it possessed under the original charters and said subsequent acts. This position was, however, decided adversely to the company, and the tax held valid.

The intent of the legislature to confer an immunity must be clear beyond a reasonable doubt. All public grants are strictly construed; nothing is taken against the state by presumption or inference. Rights not expressly granted are reserved; there is no safety to the public interests in any other rule.

The provision as to the quarter of one per cent tax is not accompanied by any words indicating the intent that no further or different tax should be levied. Fixing a tax, is only

the designation of its *then* rate and no assurance as to the future.<sup>1</sup>

The provisions giving the consolidated company all the rights and privileges vested in the original companies, had the purpose of merely vesting in it that which the original companies had previously possessed under their separate charters; namely, the rights and privileges in Maryland, which the Maryland company had there enjoyed, and the rights and privileges in Delaware, which the Delaware company had there enjoyed; it had not the purpose of transferring to either state and enforcing therein the legislation of the other.

The new company was clothed by the legislature of Delaware, so far as that legislature could clothe it, with all the rights and privileges of both the original companies; but as the Maryland company took under the legislation of Maryland only exemption from taxation of its shares in Maryland, the privilege of the new company in this matter could only be a similar exemption in that state, not a similar exemption of the shares of its capital in Delaware. These provisions have been thus construed in a former case.<sup>2</sup>

#### SECTION FIFTEEN.

**The Central R. R. & B. Co. v. Georgia; The South Western R. R. Co. v. Same; State v. The Augusta & S. R. R. Co., 54 Georgia 401.**

**Consolidation held not entitled to constituent's tax exemption.**

Action by the State of Georgia<sup>3</sup> to recover amount of a tax from the Central Railroad and Banking Company and two other railroad companies; the original charters contained an exemption from taxation. It is said that if the defendant were still acting under its original charter, the exemption would have to be respected; but inasmuch as it took a new charter at the hands of the state, and when so doing there was a statute giving the state the right to withdraw any charter which it might grant, it follows that such new charter was

<sup>1</sup> The Commonwealth v. The Easton (more) Railroad Company v. Maryland, 10 Pa. St. 451. land, 10 Howard 877.

<sup>2</sup> Philadelphia, Wilmington & Baltimore (title erroneously omits Baltimore) v. Georgia, 92 U. S. 665.

subject to such right of withdrawal, and such right necessarily included the right to modify or restrict the exercise of it.<sup>1</sup> The fact that the defendant did take the new charter is shown as follows: By act of August, 1872, the original company is authorized to consolidate with the Macon & Western R. R. Co., under the name and charter of the former. The stocks and properties were to be united; the stockholders in the latter were to receive their proportionate number of shares of the capital stock of *the consolidated company*. The new capital stock should not exceed the capitals of the two original companies added together; the stockholders' consent must be given; the governor notified; neither company was to be discharged from its contracts, but the same were to be binding on the consolidated company which, also, was to have all their benefits and rights; all conflicting laws are repealed.

This was an act of incorporation as defined by the common law<sup>2</sup> and by the code;<sup>3</sup> it formed an artificial body with capacity to take or do; or also an artificial body for specific purposes. One corporation may be made out of another corporation.<sup>4</sup>

This was a new incorporation, granting to the consolidated corporation all the rights, privileges etc., which belonged to either company, but did so by reference to the original charters instead of setting forth specifically all such rights, privileges, etc., in the terms of the new charter; and in addition thereto still other privileges were granted. The acceptance of these grants (in 1872) created a new contract between the corporation and the state in lieu of the original one of 1835, and which was therefore subject to the laws of 1863; the new contract had as a new feature, the fact that the Macon & Western Railroad Company was brought into it by consolidation; this made such a *novation* of the original contract under the old charter, as put an end to it and created a new company under the charter of 1872. Hence the Central Railroad and Banking Company is subject to the tax law of 1874.

<sup>1</sup> The West End & Atlanta Street Com. 307; Denton v. Jackson, 2 John. Railroad Co. v. The Atlanta Street Ch. Reports, 324.

Railroad Co., 49 Ga. 151.

<sup>3</sup> Code, 1670.

<sup>2</sup> 4 Comyn's Digest, top page 465, title, Corporation, also 470; 2 Kent's

<sup>4</sup> 6 Viner's Ab. 260.



The Southwestern Railroad Company was to consolidate upon consent of its stockholders; this was obtained in 1868; hence the acceptance on the part of the company and the formation of the contract with the state dates from 1868 (and not from 1845, under the original charter), and is subject to the act of 1863, reserving the state's right of withdrawal, and therefore the exercise of the taxing power in 1874, did not impair the obligation of the contract contrary to the United States constitution. Said road is subject to the tax.

The Augusta & Savannah Railroad Company has, however, stood upon its original charter of 1838, granted at a time when the state had no reserved right of withdrawal; hence as to that road, the tax law of 1874 can not be enforced. It would be contrary to the United States constitution to do so.

McCay, Judge, concurring, delivers an exhaustive and interesting opinion upon the origin and meaning of the word "consolidation" as applied to corporations. The application of the word is new and confined to the United States. In England "amalgamation" is used, but with no certain and defined meaning. Dr. Brice treats amalgamation in connection with novation.<sup>1</sup> Amalgamation is not used in the United States. In England it seems to be distinct from a "transfer of business."<sup>2</sup> The latter case is treated as a purchase, the former as a combination. "Consolidation" is common in the United States, but used only where there is a complete merger of two companies. It is defined as a "dissolution of the old corporations" and at the same instant the creation of a new, with property, liabilities and stockholders derived from those thus passing out of existence.<sup>3</sup> *Both* companies are empowered to consolidate; the debts of both become the debts of the new; the stock to be issued to the stockholders of the Macon & Western is to be stock in the consolidated company; this is inconsistent with the defendant's contention that the act merely intended to allow purchase by the Central Railroad Company of the Macon & Western. The company is called the consolidated company; stockholders of both must consent; the debts of the old companies are carried over to the new. "It is impossible to con-

<sup>1</sup> Brice's *Ultra Vires*, 509 and note. 172; *Lawrence v. Lebanon Railroad*

<sup>2</sup> Act of 1883, 1834 Vic. C. 61. Company, 80 Pa. St. 42; *Pausel v.*

<sup>3</sup> *McMahon v. Morrison*, 16 Indiana Northern Miss. R. R. Co., 42 Miss. 63.

ceive of consolidation if this be not one." The old companies cease to exist, not by express language, but because all their property and debts are absorbed in the consolidated company. Had a new name been taken no one would have contended for a moment that the old Central company did not go out of existence. The union and consolidation must be certified to the governor and recorded; this fits the idea of a surrender of the old charters and acceptance of the new; such formality would not be required upon the acceptance of a mere amendment to a prior act of incorporation.<sup>1</sup>

### SECTION SIXTEEN.

**Central Railroad & Banking Co. v. Georgia, 92 U. S. 665; reversing 54 Ga. 401.**

**Same topic: Consolidation held so entitled; last case reversed.**

A company which, by its charter, was exempt from taxation, was authorized to consolidate with another which was not. The consolidation was effected by the stockholders of the latter company canceling their stock and receiving an equivalent amount in the stock of the former company, which company was to issue a total amount equal to the stocks of both. The business and property was to continue under the former company's name. This having been effected, the state thereafter sought to tax the entire properties. The state supreme court sustains this view, but the United States supreme court reverses the decision and holds that so much of the property as was derived from the former company, remains free from tax, but the other is subject to taxation.

Whether consolidation works a dissolution of the old companies and the creation of a new one depends upon the statute under which consolidation takes place, and the intention therein manifested. "If in the statute there be no words of grant of corporate power it is difficult to see how a new corporation is created." There is no case which directly decides that it is.<sup>2</sup> The act in question plainly contemplated no such result; the

<sup>1</sup> Reversed, 92 U. S. 665.

172; *Clearwater v. Meredith*, 1 Wall.

<sup>2</sup> *McMahon v. Morrison*, 16 Ind. 40, distinguished as dicta.

various provisions are modifications or extensions of the pre-existing charter, and do not contemplate its surrender. The consolidated road possesses, in like manner and to the same extent, the privileges and advantages which each constituent company had before the union.<sup>1</sup>

#### SECTION SEVENTEEN.

**Louisville & N. R. Co. v. Palmer, 109 U. S. 244.**

**Tax exemption does not pass by assignment or by conveyance of road.**

The Alabama & Florida Railroad Company, incorporated January 8, 1853, had its capital stock and property exempt from taxation and its officers, etc., released from militia and jury duty by its charter and by the laws then existing. The constitution of the state, of 1868, subjected the property of all corporations, except charitable, to taxation. The road's property was sold on mortgage foreclosure December 10, 1872, to the Pensacola & Louisville Railroad Company. The act incorporating said road February 4, 1872, stated that it had become the assignee of the Alabama & Florida Railroad Co., and the franchises of the said corporation, and being in possession of and operating said line of road, which corporation was exempt from taxation for a limited period, the said Pensacola & Louisville Railroad Company and its property, now owned or hereafter to be acquired, shall also be exempt from taxation during the remainder of said period. By various acts and transfers the last named company's property together with all its rights, franchises and privileges came into the hands of the Louisville & Nashville Railroad Company.

The court, following *Morgan v. Louisiana*, 93 U. S. 217, holds the original exemption of the Alabama & Florida from taxation to be not assignable; no words of assignability are used by the legislature in the language of the statute creating it, and from its nature and context, it is to be inferred that the exemption of the property of the company was intended to be of the same character as that declared in reference to its capital stock and to its officers, servants and employes, and that

<sup>1</sup> Delaware Railroad Tax Case, 18 Wall. 206; *Tomlinson v. Branch*, 15 Wall. 460.

all alike were privileges, personal to the corporation, or to the individuals connected with it. This exemption, therefore, did not pass from the Alabama & Florida Railroad Company to the Pensacola & Louisville Railroad Company by the conveyances which passed the title to the railroad itself, and the franchises connected with and necessary in its construction and operation. This conclusion is strengthened by the part of the act which declares that the Pensacola & Louisville Railroad, having become assignee of the Alabama & Florida, shall also be exempt from taxation; thus raising the inference that the legislature thought a new grant of exemption was necessary.

The exemption from taxation does not pass by virtue of the conveyance of a road and its franchises, but requires for its transfer, some particular and express description, indicating unequivocally the intention of the legislature that it might pass by assignment. The various acts of 1872 and 1877, purporting to create exemptions from taxation, or to renew to the purchasing company the exemption existing originally in favor of the Alabama & Florida R. R. Company, can not have any efficacy; because, as original grants, they are void by reason of the constitutional prohibition of 1868, and as renewals they are also void, for the same reason, inasmuch as renewals in form, are in fact the creation of new grants; the inhibition of the constitution applies in all its force, as it is said in *Trask v. Maguire*, 18 Wall. 391-409, against the renewal of an exemption equally as against its original creation.

True, the grant was valid in 1855, but it does not adhere to the property like an easement or covenant running with land. It is not an immunity impressed upon a thing, but it is a grant to a person in respect of a thing; and such a grant can not have an existence unless accepted by some person capable of accepting it; but after 1868, there was no such person; for corporations could not thereafter be created capable in law of holding property free from liability to taxation.<sup>1</sup>

<sup>1</sup> Exemption from taxation can not be extended to leased lines; nor to *Co. v. Grand Rapids* (Mich.), 60 N. W. prevent special assessments for local R. 767.

## SECTION EIGHTEEN.

**Morgan v. Louisiana, 93 U. S. 217.**

**Property passes to purchaser deprived of tax exemption.**

Action by the state to recover taxes assessed on the railroad property in defendant's hands, which he had obtained in part on a foreclosure purchase, and in part upon a sheriff's sale or a money judgment, and which property had formerly belonged to the New Orleans, Opelousas & Great Western Railroad Company, and was then exempt from taxation. The mortgage covered the franchises; the question is whether the immunity from taxation accompanied the property in its transfer to the defendant, or whether it was a mere personal privilege with the railroad company and not transferable. It can hardly be supposed that the legislature intended that such exemption should follow for all time the fixtures, vehicles, workshops and warehouses after they had ceased to be the company's property, and carry to other persons a privilege intended only for the benefit of the corporation. Exemption from taxation must be clearly granted; it will not be presumed;<sup>1</sup> the whole community is interested in keeping the power of taxation undiminished. Evidently the exemption is of the capital stock, vehicles, works, warehouses, etc., of the corporation, and only so long as these remain the corporation's property; thus also the officers, etc., are exempt from military and jury duty; but no one would pretend that this exemption remains after they are out of office. The exemption is analogous to that of individuals who have certain articles exempt from execution, but after these have passed into other hands the exemption ceases.

Confusion is often created from attaching a vague meaning to the term "franchises;" they are the rights which are essential to the operation of the road; *e. g.*, the franchise to run cars, take tolls, appropriate earth and gravel for the bed of its road, or water for its engines and the like, without which it would be impossible to operate the road. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the

<sup>1</sup> *Providence Bank v. Billings*, 4 Pet. 561; *The Delaware Railroad Tax*, 18 Wall. 206.

latter is personal, and incapable of transfer without express statutory direction,<sup>1</sup> and is not a franchise of a railroad corporation which passes as such without other description to a purchaser of its property. The opinion of the supreme court of the state, upholding the tax, is affirmed.<sup>2</sup>

<sup>1</sup> Cases reviewed: *New Jersey v. Wilson*, 7 Cranch 164, land purchased by the state from the Indians; the exemption was expressly attached to the lands and not to owners. *Home of the Friendless v. Rouse*, 8 Wall. 430, property was still in original grantee's hands. *Wilmington R. R. v. Reid*, 13 Wall. 264, the legislature has power to make an exemption. *Trask v. Maguire*, 18 Wall. 391, the new company was to have the "immunities" of the old; this would include the exemption, but it was decided that the legislature was prohibited by the constitution from conferring such privilege; and that the same was not necessary in providing for the sale of defaulting railroads; franchises are there construed to be those which are essential to the operation of the road. *Humphreys v. Pegnes*, 16 Wall. 244, immunity of particular property from taxation is a privilege which may sometimes be conferred under that designation.

<sup>2</sup> Defendant's citation in brief: The exemption was authorized and formed an inviolable contract. *New Jersey v. Wilson*, 7 Cranch 164; *Jefferson Bank v. Shelly*, 1 Black 536; *Howe, etc., v. Rouse*, 8 Wall. 430; *Wilmington R. R. v. Reid*, 13 Wall. 264, 269; *Humphrey v. Pegnes*, 16 Id. 244; 18 Id. 392; 20 Id. 36; 21 Id. 492; *Lacey's Dig. Ry. Decisions*, p. 853; 31 Ill. 484; 17 Id. 291.

Exemption from taxation is a franchise that may be mortgaged and

sold, especially in Louisiana. *La. Statutes* 1853, 1854, 1856, Civil Code Arts. 2449, 3183; above citations, also *Trask v. Maguire*, 18 Wall. 392; *Pacific R. R. v. Maguire*, 20 Wall. 36; *Bardston, etc., R. R. Co. v. Metcalf*, 4 Ky. (Met.) 199; *Allen v. Mont. R. R. Co.*, 11 Ala. 437; *Pollard v. Maddox*, 28 Ala. 321; 30 Vt. 182; 70 Penn. 355; *St. Paul Co. v. Parker*, 14 Minn. 297; *Lacey's Dig. Ry. Decisions* 753; *Union Bank case*, 6 Humph. 515; *Enfield v. Hart*, 17 Conn. 40.

Plaintiff's citations in brief: Only by virtue of an express authorization of the legislature can the franchises of a corporation be divested. This was not the case at the sheriff's sale, made in the execution of an ordinary judgment on an ordinary debt against the railroad company. 1 *Redf. Railw.*, c. 7, p. 117 (Ed. 1873); 2 Id., c. 7, pp. 484, 501 (Ed. 1873); *Lacey's Dig. Ry. Decisions*, p. 292, Nos. 4, 7, 21, 25; *Plymouth Railroad v. Colwell*, 89 Penn. St. 337; *State v. Rives*, 5 Ired. 297; *Benedict v. Heineberg*, 43 Vt. 231; *State v. Mexican Gulf R. R. Co.*, 3 Rob. (La.) 513.

See also *Nashville, etc., Co. v. Commonwealth (Ky.)*, 80 S. W. R. 200. New corporation does not get tax exemption of old unless expressly so specified. *State v. Anderson (Wis.)*, 63 N. W. R. 746. A franchise being inalienable, remains taxable to the vendor; the attempted purchaser can not be taxed.

## SECTION NINETEEN.

**Wilson v. Gaines, 103 U. S. 417.****Same topic continued.**

Bill to enjoin collection of taxes. Complainant bought a railroad upon a sale held in pursuance of a foreclosure by the state of its statutory lien; said lien covered the entire road, stock, right of way, etc., "and all the property owned by the company as incident to, or necessary for, its business."<sup>1</sup>

Complainant claimed the same immunity from taxation which the original owner of the road possessed. This claim is denied on the basis essentially of *Morgan v. Louisiana*.<sup>2</sup> Moreover the lien was put only on the property; it did not even, in express terms, include the franchises, hence if there were nothing more, it would be clear beyond all question that the sale would not necessarily carry with it any immunity from taxation. But as the case stands on demurrer, it is contended that it is admitted, as alleged in the bill, that the road was sold with its "franchises, property, rights, privileges, immunities," etc.; still there is also the equally distinct statement that the sale was under the foreclosure of the statutory lien, and as that lien was confined to "the property owned by the company, or incident to, or necessary for, its business," it will not be presumed that more was sold than the lien covered. The unreported case cited to the contrary, from the state supreme court,<sup>3</sup> distinctly adjudges that all the "rights, franchises, privileges and immunities as defined by the charter and laws, and the decree in the cause, passed to and vested in the new company." But the bill in this case states nothing of the sort; it does not say what the decree was, but only what was sold; and it can not be presumed that more was sold than the lien to be adjudicated upon implied.

<sup>1</sup> Acts of 1851-2, c. 151, Secs. 1, 4, pp. 204-206.

<sup>2</sup> 93 U. S. 217.

<sup>3</sup> *The Knoxville & Ohio Railroad Company v. Hicks*, Supreme Court Tennessee, September term, 1877.



## SECTION TWENTY.

**Memphis & L. R. R. Co. v. Berry, 112 U. S. 609; 5 S. C. R. 299.**

**Foreclosure purchasers, forming reorganized company, are not entitled to original exemption.**

A special statute in 1853, under which a railroad company was organized, contained provisions exempting it from taxation, and allowing it to borrow money on its charter and works. The company made a mortgage upon its property, and included therein its charter, and all the rights and privileges and franchises thereof. This mortgage was foreclosed and the property bid in by a committee in trust for the holders of the bonds by it secured. These bondholders then, in 1877, filed articles of association, purporting to be under the original act of 1853, called themselves by the same name "as reorganized," caused the property, etc., to be conveyed to them, and thereupon they claimed to be entitled to the exemption from taxation contained in the act of 1853. Their position was, in brief, that as the original company was authorized to mortgage its charter and franchises, and as they were now the owners thereof, they were entitled to all the benefits therein granted; this very plausible view, however, failed to persuade the court, which says that it is not claimed that the present corporation is the identical body with the original one, for that would involve an assumption of the debts thereof; but it is insisted that the present corporation stands in lieu of the original one, and is "entitled to all the provisions of the charter, by relation to its date, as though it had been originally organized under it. But such a construction of the words authorizing a mortgage of the charter and works of the company is, in our opinion, beyond the intention of the law, and altogether inadmissible. There is no express grant of corporate existence to any new body." Grant of corporate existence is never implied;<sup>1</sup> nor can it be transferred from one corporation to another.<sup>2</sup> The franchises of the corporation are distinguishable from the franchise to be a corporation; the former are the property of the corporation,

<sup>1</sup> *Central R. & B. Co. v. Georgia*, *Hall v. Sullivan R. Co.*, 21 Law Rep. 92 U. S. 665-670. 188; 2 Red. Am. Cas. 621; 1 Brunner's

<sup>2</sup> *Com. v. Smith*, 10 Allen 448-455; *Collected Cases* 618.

the latter is the property of the stockholders. If the mortgage and sale of the charter creates a new corporation, what becomes of the old one? If it abides, as it may, for the purpose of responding to obligations or of owning property not covered by the mortgage, then there would be two corporations under the same charter; and though there might be authority in such case for judgment of dissolution of the original corporation, yet, until such judgment, it must be regarded as still existing.<sup>1</sup> The real effect is the abandonment of the old charter by the incorporators, and a grant *de novo*, of a similar charter to the so-called transferees or purchasers.<sup>2</sup>

### SECTION TWENTY-ONE.

**Trask v. Maguire, 18 Wall. 891.**

**State buying in a road on foreclosure of its own lien, thereby deprives it of tax exemption.**

Bill to enjoin the collection of a tax on railroad property, which, in the hands of the original owner, was exempt from taxation.

The state aided in the construction of the original road and preserved a statutory lien, for its advances, upon the road and its appurtenances, authorizing a sale thereunder, in case of default in payment.

Thereafter, in 1865, the new constitution was adopted which prohibits exemption from taxation, and an ordinance was also adopted, as part of the constitution, providing for the sale of the property and franchises of defaulting railroads. The judges of the supreme court, having been called on for an opinion, gave it by saying that whenever such defaulting road is sold and the state becomes the purchaser, the state must,

<sup>1</sup> *Coe v. Columbus P. & O. R. Co.*, 10 Ohio St. 372-386. S. W. R. 989. Nor by grant to a successor of all the rights and franchises

<sup>2</sup> *State v. Sherman*, 22 Ohio St. 411-428; *Railroad Co. v. Georgia*, 98 U. S. 359. of a former corporation with proviso it should be subject to the general railroad laws. *Norfolk & W. R. Co. v. Pendleton*, 15 S. C. R. 413.

Immunity from taxation being personal, can not be transferred by sale of charter without consent of state. It does not attach to nor pass with the property. *Bloxham v. F. C. & State v. Mercantile Bank (Tenn.)*, 81 P. R. Co. (Fla.), 17 S. R. 902.

when again selling such road, reserve a lien, but otherwise it was not restricted as to the terms and conditions of such sale.

Thereafter the state foreclosed its lien; advertising for sale the roads, "their appurtenances, rolling stock, and property of every description, and all rights and franchises," and the act under which the proceedings were had, provided that the purchaser was to have all the rights, franchises, privileges and immunities which were had and enjoyed by the original corporation under the charter and the laws amendatory thereof.

Another act provided for the incorporation of purchasers of any railroad "which has heretofore or may hereafter become forfeited to and sold by the state;" and gave such corporation the same power, franchises, rights and privileges, and made it subject to the same liabilities and restrictions as the corporation to which it became successor, into and over the property and franchises forfeited and sold.

The state bought the railroad and its appurtenances at the sale under the lien; the commissioners acting for the state sold it to three persons, who sold it to Allen, and he organized himself and certain others, including complainant, into a new corporation having the same name as the old.

Complainant contended that the state meant to retain in its lien, and in turn sell again, all the immunities, including exemption from taxation; as it was this which gave additional value and hence greater security. Also that appurtenance would include immunity.<sup>1</sup>

The court holds to the contrary. However broad the advertisement for the sale, the interest sold could not extend beyond the property upon which the state at the time held a lien, and this was the entire road of the company and its appurtenances. It need not be considered what the effect would have been had the sale been to a third person. The sale was to the state itself and with that the immunity ceased.

The state thenceforth held the property free from taxation, not by virtue of any previous stipulation with the company, but as all property of the state is thus exempt. The state thereafter sold the property, and its commissioners, acting in accordance with the statutes, purported to have conferred upon

<sup>1</sup> Pickering v. Staples, 5 Sergeant & Rawle, 107; Bouvier's Law Dictionary, title "Appurtenances."

the purchasers an exemption from taxation. This they could not do; the new constitution going into effect prior to said sale prevents any such exemption. The answers of the supreme court judges that the legislature is unrestricted as to the time, terms and conditions of the sale, mean only to say that aside from reserving its lien, the sale is otherwise at the state's discretion, and not restricted by the ordinance; the judges were not called upon to give, and did not give, any opinion as to the constitutional clause now in question. The ordinance, when saying that the general assembly shall provide by law how railroads shall be sold, must have meant such law as could constitutionally be passed. The provision for sale of the franchises with the roads, does not require immunity from taxation to be embraced with them. The franchises meant are evidently those which are essential to its operation and without which it would be valueless, such as the franchise to run cars, to take tolls and the like. The ordinance could not have meant to sanction the renewal of an exemption which had once ceased to exist, and which the constitution declared should never thereafter be created. The inhibition applies equally against a renewal as against an original creation.

#### SECTION TWENTY-TWO.

**Charlotte, C. & A. R. Co. v. Gibbes, 4 S. E. 49.**

**Consolidation is not entitled to constituent's exemption.**

Two companies, exempt by their charter from the tax contained in section 41 of the act of 1841, consolidate; it is held that they are thereby dissolved, and a new and distinct company is formed, which company derives its powers from the act under which it is organized and not from the original charters, and such company's rights are measured by the laws in force at the time of the consolidation, according to which it is not exempt from the tax.

SECTION TWENTY-THREE.

**Railroad Company v. Georgia, 98 U. S. 359.**

**Consolidation becomes subject to state's right to alter charter and to impose tax, although constituents were not, because formed prior to state's reservation of right being adopted.**

The Savannah, Albany & Gulf R. R. Co., and the Atlantic & Gulf Railroad Company were, by charter, exempt from taxation in excess of a certain limit. Upon April 18, 1863, the legislature passed an act allowing them to consolidate, and when consolidated they should be known as "The Atlantic & Gulf Railroad Company." The act provided that neither company should be released from any contract, but that this company should be liable on the same.

It was also enacted that the stockholders of said consolidated company, by such corporate name and in such corporate capacity, should be capable in law to have property, sue and be sued, etc.

It was also enacted that the several immunities, franchises and privileges granted to the said roads, by their original charters and amendments, and the liabilities therein imposed, should continue in force, except so far as they might be inconsistent with the act of consolidation.

From these provisions the court arrives at the conclusion that the old companies passed out of existence and that the result is a new and different company; it would be entitled to the exemption from taxation enjoyed by the original companies, because all privileges of the old companies were conferred upon the new by said act of 1863; but inasmuch as said act was passed subsequently to January 1, 1863, and on that date the code went into effect, by which the legislature reserved the right to change or withdraw all private charters, it followed that the state, by its subsequent act of February 28, 1874, had the right to deprive the company of its exemption from taxation. It is held that the company is no longer drawing its existence from the charters existing prior to 1863 (which the state would have been powerless to impair), but entirely from the act of April 18, 1863.

The test of the question is so clearly stated, that it may be

well to epitomize it here. The question is, was a new company created, or was it a mere alliance between two old ones, each preserving its identity and distinctive existence? or again, was it the absorption of one by another, the former being dissolved, the latter continuing to exist? Evidently, the legislative intent was to create a new company; one capital was made in place of two. The separate capitals going out of existence, those companies could not continue their separate being. True, the old companies are declared not to be released from their debts, but it is also said that "this company (the one created by the act) shall be liable on the same." The new company is thus distinguished from the two old ones. The contracts are mentioned only to authorize their novation. The act mentions the original charters, hence must have contemplated a later charter. The act conferred all the usual corporate powers upon the consolidated stockholders, evidently for the purpose of creating a corporation; it would otherwise be meaningless; it would be unnecessary to grant corporate powers if the two original companies, possessing these already, were not to be dissolved but were to continue in being. The effect of consolidation is to be distinguished from the merger of one company into another. It is a necessary result of consolidation that the original companies are dissolved, and a new corporation created out of their elements. Each set of stockholders is shorn of the power, which, as a body, they had before. Its action is controlled by a power outside of itself. Neither set can thereafter perform any duty of building or managing the road, which, before such consolidation, it could and should have done. Their powers, franchises, privileges, duties, are gone into the new organization, having its existence under the consolidation act. Nothing remains of the old companies. They must have passed out of existence and the new company must have succeeded them.

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**Constituent exempt organized before constitution adopted; consolidation organized thereafter is not exempt.**

The charter of 1853, of the Cairo & Fulton Railroad Company, exempted the road from taxation. The constitution of



the state, of 1868, declares that the property of corporations now existing or hereafter created, shall forever be subject to taxation the same as that of individuals. On May 4, 1874, the road was consolidated with the St. Louis & Iron Mountain Railroad Company, forming thereby the St. Louis, Iron Mountain & Southern Railway Company. It is held that this last named company has not obtained the exemption from taxation. That the last resultant company is a new company, created in 1874, and hence subject to the provisions of the constitution of 1868. This conclusion is reached from the following considerations: the consolidated company, viz., St. Louis, Iron Mountain & Southern Railroad Company, is not the identical corporation which was the Cairo & Fulton Railroad Company. It is in several clauses spoken of as "the new company," in the sundry resolutions and contracts. The two constituent companies agree to become one corporation, and a new name is given to the "new corporation." The capital stock is made different from that of either or the aggregate of both of the old companies. All property of either company is declared to be conveyed to the new corporation. The new corporation must consequently be deemed as having its origin and existence as of May 4, 1874, and hence subject to the taxation clause contained in the constitution of 1868. Nor is this view in the least weakened by the fact that the charter of 1853 gave the Cairo & Fulton Railroad Company the right thereafter to consolidate with other roads, and hence that this right of consolidation was thus secured by contract with the state, which contract the state could not thereafter impair by legislative or constitutional provision. Truly such contract exists, and it gives the irrevocable right to consolidate; but such consolidation, whenever it occurs, can be with only such powers and privileges as at the time of the consolidation may be within the power of the state to confer, and lawful for the new corporation to accept. It must be presumed that, when the original corporation entered into the consolidation, it did so in full view of the existing law, and with the intention of forming a new corporation, such as the constitution and laws of the state at that time permitted; and that is the legal effect of the transaction. This decision, denying to the new corporation any exemption privileges, whatsoever, of the old corporation, makes it unnecessary to decide, says the court,

whether or not the new corporation has also failed to acquire a *pro tanto* exemption, to the extent of the property brought into the consolidation by the Cairo & Fulton Company (under the rule laid down in *Railroad Co. v. Maine*, 96 U. S. 499).

#### SECTION TWENTY-FIVE.

##### **Maine Central Railroad Company v. Maine, 96 U. S. 499.**

**Exemptions dependent on separate managements of the roads are lost when consolidation merges all the roads into one.**

Several Maine railroads holding charters of date prior to 1874, were consolidated by various acts of the legislature prior to 1874. These charters respectively provided that the companies should first pay ten per cent to the stockholders, and a moiety of the earnings in excess of that to the state, in lieu of other taxation, and be exempt from any other. Divers provisions were also contained in the respective charters, requiring the company to keep accounts, make reports, etc.

The act of consolidation provided that the resultant company should be a new corporation by the name therein mentioned, that it should have "all the privileges, powers and immunities" possessed by each of the corporations entering into the consolidation agreement, and be subject to all the legal obligations resting upon them respectively; that the old corporations should not be deemed extinguished nor their charters annulled, but that they should be regarded as still subsisting so far as their continuance for the purpose of upholding any right, title or interest, power, privilege or immunity, ever possessed, exercised or enjoyed by either of them, may be necessary for the protection of the creditors or mortgagees of either of them, or of such new corporation; the separate exercise of their respective powers and the separate enjoyment of their respective privileges and immunities being suspended until the protection of such creditors or mortgagees shall require their resumption, when such suspension shall cease, so far and for such time as the protection of such creditors or mortgagees may require.

In 1874 the state imposed a general tax upon the consolidated company; and its right to do so was sustained. So long

as the constituent companies preserved their separate existence and remained distinct corporations, only the limited tax prescribed in their charters could be imposed upon them. But when they were merged in the new corporation, their distinct corporate existence ceased, except so far as such existence might be necessary to protect their creditors or mortgagees, or those of the new corporation. The various conditions obligatory upon the original companies respectively could be performed only by them while retaining their distinct organization and management; such conditions related to the accounts of disbursements, expenditures, receipts, for the inspection of the state officials, and were to be performed by the treasurers, directors and other officials of the original companies respectively. Consequently, by merging all their property and management into one, they utterly disabled themselves from complying with these conditions, and it was only upon such compliance that the exemption from taxation could be claimed. The new company in no manner assumed these conditions, neither are the same anywhere made obligatory upon it, nor could they have been complied with; the assets of all the companies were intermingled, and continuous trains were run over the whole length of the several roads. It became impossible to show what would have been the earnings of each road; only a speculative approximation could have been made. The exemption, therefore, of the respective original companies from taxation, must be taken with the qualification that it was only so far as it could be exercised or enjoyed by it with its own officers and distinct constitution; where the enjoyment or exercise of such exemption required other officers or a different constitution the grant thereof was to that extent necessarily inoperative.<sup>1</sup> The consolidated company was a new corporation, as distinct from the original companies as though it had been created before their existence; the fact that their powers, etc., were conferred upon it, makes no difference; a new corporation is as readily created by the union of corporations as by the union of individuals; and its powers and privileges may as well be designated by reference to the charters of other companies as by special enumeration.

<sup>1</sup> Following cases distinguished: U. S. 665; C. & O. R. R. Co. v. Virginia R. R. Tax Case, 18 Wall. 206; Central, etc., v. Georgia, 92 U. S. 718.

## SECTION TWENTY-SIX.

**State v. Maine Central R. R. Co., 66 Maine 488.****Same topic.**

Action by the state to recover a tax on property in the hands of a railroad company; said property is claimed to be exempt from taxation because it was exempt in the hands of the company originally owning it. Tax sustained.

Defendant is the result of two successive consolidations of five original corporations. The tax in controversy is assessed upon the new corporation as organized under the last act of consolidation. The property would be exempt were it still held by the original corporations; their charters contained this exemption and it was irrevocable.<sup>1</sup> The original corporations, however, were required to give an account of their net incomes and be taxed on that. The exemption, therefore, is a contract with each road respectively, and with it alone, and with no other corporation, and is enforceable only so long as it complies with the conditions imposed as to accounts, reports, etc. The exemption must be granted in clear terms; no presumption is in its favor; every reasonable doubt is against it, because taxation is necessary to government and is never presumed released.<sup>2</sup>

The five original corporations became consolidated.<sup>3</sup> "A new corporation may as well be created by the union under a new organization, of existent and distinct organizations as of individuals. The new corporation is equally distinct from its component parts whether composed of corporations or of individuals.<sup>4</sup> The old corporations are dissolved except so far as they may be permitted to exist for the purpose of protecting creditors or mortgagees. The corporate rights of the new corporation are those derived from its charter—the act of consolidation—under and by virtue of which alone it began to be, and is."

<sup>1</sup> *Wilmington R. R. v. Reid*, 13 Wall. 264; *Delaware Tax Cases*, 18 Wall. 206; *Humphrey v. Pegnes*, 16 Wall. 244, 249; *Erie Ry. Co. v. Pennsylvania*, 21 Wall. 492, 498.      <sup>2</sup> *Special Laws of 1856*, c. 651.  
<sup>3</sup> *Bishop v. Brainerd*, 28 Conn. 289; *McMahon v. Morrison*, 16 Ind. 172; *Clearwater v. Meredith*, 1 Wall. 25, 40; *State v. Sherman*, 22 Ohio 411;

<sup>4</sup> *Tucker v. Ferguson*, 22 Wall. 527, 575; *St. Louis v. Boatman's, etc.*, 47 Mo. 155.      *Hamilton v. Hobart*, 2 Gray 543; *Com. v. A. & G. W. R.*, 53 Penn. St. 9.

The act of consolidation speaks of defendant as a *new* corporation; so does the agreement of consolidation; these also fix the number of directors, amount of capital, number of shares. The act continued the existence of the original corporations so far as for the purpose of upholding any right, title or interest, power, privilege or immunity ever possessed, exercised or enjoyed by either of them, may be necessary for the protection of the creditors or mortgagees of either of them, or of such new corporation. The rights, franchise, property and interest of the original corporations was deemed vested in the new one.

The defendant must be enabled or required to make the several returns of net income, in order to claim the immunity; this it did not do and can not; it is a new corporation, having its own stock the same as if the stockholders were original subscribers thereto.

The new corporation dates its corporate life from the special act of consolidation; that was the grant of a new charter; its alleged claim to exemption must arise, if at all, from that act. None is conferred in clear terms; there was no consideration for any; the roads which were consolidated had been built for a long time; the act conferred a benefit on the stockholders of the old corporations by giving them a charter to form a new one. For a state to give up its right of taxation there must appear a grant in positive terms and upon an adequate consideration.<sup>1</sup>

The new corporation has commingled all the stocks, assets and properties of the five old ones and can not make the net income reports on which the exemptions were conditioned, and even if it could, yet the reports *by it* made are not the same as reports made by the original companies; its officers are not their officers. The original corporations are continued in existence, but only as to the protection of their creditors and mortgagees; otherwise they cease to be, and can not and do not make such reports.

The new corporation accepted its charter at a time when the statute reserved the right to the state to amend, alter or

<sup>1</sup> Tucker v. Ferguson, 22 Wall. 527; Boatsman, etc., 47 Mo. 150, 155; Jones, etc., M. Co. v. Common- Christ Church v. Pennsylvania, 24 wealth, 69 Pa. St. 137; St. Louis v. How. 300.

repeal charters, and hence accepted it subject to such reservation.<sup>1</sup>

The act of consolidation is as fully an act of incorporation as any other; no particular form of words is requisite to create a corporation; a grant to hold mercantile meetings has been held to confer corporate capacity.<sup>2</sup> The new corporation obtains the rights mentioned under the old charters, merely by reference thereto, and such act should be strictly construed against the corporation.<sup>3</sup>

The act gave defendant "all the powers, privileges and immunities possessed by *each* of the corporations," but does not give all possessed "by *each* and *any one*, or *any two* of the corporations." Some had an exemption and some not.<sup>4</sup> The grant is therefore only as to such privileges as *all* the corporations had; and does not cover such as some had and some had not.

Some of the corporations were formed out of mortgagees of pre-existing corporations; these as well as the last consolidated company were new corporations, alike by common law and by statute.

The act imposing the tax is clearly valid, and in no case should a legislative act be held invalid until the violation of the state or federal constitution is proved beyond all reasonable doubt.<sup>5</sup>

#### SECTION TWENTY-SEVEN.

**Ohio & Mississippi R. R. Co. v. Weber, 96 Ill. 443.**

**When one constituent is domestic the consolidation is formed under laws of Illinois and subject to general tax.**

Suit by the Ohio & Mississippi Railway Company to enjoin collection of taxes extended on its capital stock in 1875; tax is resisted on the ground that complainant is not a corporation

<sup>1</sup> Tomlinson v. Jesup, 15 Wall. 454,      <sup>2</sup> Bowling Green, etc., R. R. v. 458; W. W. R. R. v. Supervisors, 35 Warren County Court, 10 Bush (Ky.) Wis. 257; Bangor v. Smith, 47 Maine 711.

34; Roxbury v. Boston, etc., R. R., 6      <sup>4</sup> The court argues this point quite Cush. 424; Holyoke Co. v. Lyman, 15 exhaustively.

Wall. 500; Miller v. State, 15 Wall.      <sup>5</sup> Ogden v. Saunders, 12 Wheat. 488. 214, 270.

<sup>3</sup> Denton v. Jackson, 2 Johns. (N. Y.) Ch. 824.

created under the laws of Illinois within the meaning of the revenue law.<sup>1</sup> The tax is sustained.

When a corporation is formed under the laws of Illinois by consolidation of others (which are merged into the new corporation thus formed) one of the constituent companies being an Illinois incorporation, the new corporation thus formed is to be considered as one of the "companies incorporated under the laws of this state," within the terms and meaning of the last clause of the first section of the revenue act.<sup>2</sup> And the capital stock (located or used in this state) of such corporation is taxable as such; it is the same as a corporation operating in two adjoining states, having a charter from each, and it has been decided as to such that the capital is taxable in Illinois.<sup>3</sup>

The complainant owns a railroad extending through Illinois and Indiana into Ohio; its corporation was formed by an Illinois corporation consolidating with companies of other states; this was done by virtue and authority of an Illinois statute; it remains as much a corporation "created under the laws of this state," as if the original Illinois corporation, acting under power granted by this state, had purchased the lines of railroad outside of the state, by permission of the states in which they lie and was operating the same. The consolidated corporation (complainant) is one corporation, having franchises from several states, and in its relation to Illinois, must be considered as having a franchise therefrom, enabling it to transact business therein, and elsewhere, by permission of the governing power where it so does.

The method of apportioning the tax is fair and reasonable; it practically uses as a basis only so much of the railroad's property as is used in this state, fixing the assessment value at such proportion as the part in this state bears to the entire property here and elsewhere.

#### SECTION TWENTY-EIGHT.

**State ex rel. Bain, Treasurer, v. Seaboard & Roanoke R. R. Co.,** 52 Federal Reporter, 450 (Circuit Court, E. D. of North Carolina).

**Taxation of shares; increase in number of same by consolidation.**

Action by the State of North Carolina to recover a tax alleged to be due from the Seaboard & Roanoke R. R. Co.

<sup>1</sup> Section 3, Rev. Stats., 1874, p. 858.

<sup>2</sup> March 30, 1872.

<sup>3</sup> Quincy Bridge Co. v. County of Adams, 88 Ill. 615.



Defendant's predecessor was a North Carolina corporation subject to a "tax not exceeding twenty-five cents per annum per share on each share of the capital stock, whenever the annual profits thereof shall exceed six per cent."

By an act of the legislature of North Carolina, the stockholders of a certain Virginia corporation were constituted stockholders in the original North Carolina corporation.

It is held that this imposition is not to be regarded as a tax upon property, but as a royalty annexed to the franchise for the grant, "the contract price to be paid by the company or its shareholders for the franchise granted to them;" it rests upon the company as a company, and is properly chargeable upon the corporation. The act of consolidation increased the shares by the number brought in, and hence the tax must be upon the total thus obtained.<sup>1</sup>

## SECTION TWENTY-NINE.

### Sundry instances.

Where there is no new grant of corporate power, the consolidation is presumed to have the tax exemptions of the original companies; they are maintained unless taken away by statute. *Tennessee v. Whitworth*, 117 U. S. 147; 6 S. C. R. 649.

The constituent's tax exemption may accrue to the consolidation, although the latter has in the meantime accepted new legislation (upon other subjects). *State v. Com. of R. R. Taxation*, 37 N. J. 243.

In a case of mere variations of the charter, amounting to neither merger nor consolidation, the tax exemption of course remains. *Cheraw, etc., R. Co. v. Commissioners*, 88 N. C. 519.

Consolidation must pay the fee to the secretary of state, whether it be composed entirely of domestic constituents or not. *Ashley v. Ryan*, — Ohio —; 31 N. E. 721.

A re-incorporation is a new corporation, and must pay franchise tax, under laws of 1886. *In re New York & Suburban I. Co.*, 40 N. Y. St. 139.

See other instances in sections two, three and four, Chapter VIII, *supra*.

<sup>1</sup> It has been held, however, that the is not to be regarded as an increase practical consolidation of two corpo- of capital stock of either. *Einstein* rations by one acquiring the owner- v. Rochester G. & E. Co. (N. Y.), 40 ship of the capital stock of the other, N. E. R. 680.

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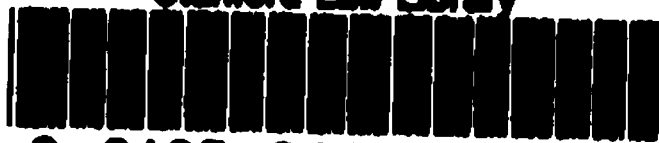
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